Supreme Court of the United States

OCTOBER TERM

No. 70-5038

JOHN ADAMS,

Petitioner,

—v.—

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

INDEX

No.

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

—*vs*—

JOHN ADAMS, DEFENDANT-APPELLANT

Appeal from the Circuit Court of Cook County, Criminal Division

Indictment No. 67-641

Honorable JACQUES F. HEILINGOETTER, Judge Presiding

Grand Jury impaneled

Indictment returned into open Court bail set at $10,000.00

State of Illinois)
) ss.
County of Cook)

The February, 1967, Grand Jury of the Circuit Court of Cook County.

The Grand Jurors chosen, selected, and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on January 4, 1967, at and within said County JOHN ADAMS committed the offense of sale of a narcotic drug in that he knowingly sold to AL NICHOLS for lawful money of the UNITED STATES OF AMERICA, otherwise than as authorized in the Uniform Narcotic Drug Act of said State of Illinois then in force and effect, a quantity, (the exact quantity of which is unknown to to said Grand Jurors), of a certain narcotic drug, to-wit: heroin, in violation of Chapter 38, Section 22-3, of the Illinois Re-

vised Statutes 1965, contrary to the Statute, and against the peace and dignity of the same People of the State of Illinois.

JOHN J. STAMOS
State's Attorney

Appearance of CHARLES B. EVINS filed

Arraignment

State of Illinois)
) ss.
County of Cook)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

Ind. No. 67-641

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

—*vs*—

JOHN ADAMS, DEFENDANT

MOTION TO DISMISS INDICTMENT
PETITION IN SUPPORT OF MOTION
NOTICE
PROOF OF SERVICE

SAM ADAM
Attorney for Defendant
134 North LaSalle Street
Chicago, Illinois 60602
Suite 1622
CE 6-5543

Motion to Dismiss Indictment

Now comes JOHN ADAMS, defendant in the above entitled cause, by and through his attorney, SAM ADAM, and moves this Honorable Court, pursuant to Chapter 38, Illinois Revised Statutes, 1963, Section 114-1, to dismiss all counts of the instant indictment, for the reasons set forth in the attached Petition in Support of Motion to Dismiss Indictment.

/s/ John Adams
Defendant

/s/ Sam Adam
Sam Adam
Attorney for Defendant

Petition in Support of Motion to Dismiss Indictment

Now comes JOHN ADAMS, defendant in the above entitled cause, by and through his attorney, SAM ADAM, and states the following in support of the foregoing *Motion to Dismiss Indictment*:

1) The defendant, John Adams, on February 10, 1967, appeared before the Honorable Kenneth R. Wendt, Judge of the Circuit Court of Cook County.

2) The defendant was charged in a complaint for examination, No. 67 CCMC690103 with sale of narcotics.

3) The facts and circumstances surrounding that complaint are the same facts and circumstances involved in the instant indictment.

4) The Honorable Kenneth R. Wendt failed to appoint counsel for defendant.

5) The Honorable Kenneth R. Wendt conducted a preliminary hearing on the said date.

6) A certified copy of the said transcript of the said hearing is attached hereto, incorporated herein and marked as Defendant's Exhibit No. 1.

7) The said failure of the Court to appoint counsel for and on behalf of the defendant, John Adams, violated the defendant's Constitutional and statutory rights under the following provisions:

I United States Constitution
Amendment VI
Amendment XIV

II Illinois Constitution
Article II, Section 2
Article II, Section 9

III Illinois Revised Statutes 1965
Chapter 38, Section 109-1

WHEREFORE, the defendant, JOHN ADAMS, respectfully moves this Honorable Court to quash and dismiss the instant indictment.

/s/ JOHN ADAMS
JOHN ADAMS
Defendant

NOTICE

To: HONORABLE
JOHN J. STAMOS
STATE'S ATTORNEY OF COOK COUNTY
2600 South California Avenue
Chicago, Illinois 60608

Please take notice that on the 28th day of April, 1967, I shall appear before the Honorable JACQUES F. HEILINGOETTER, one of the judges of the above Court, or whomever is sitting in his place, and there present the attached motion and supporting documents.

/s/ SAM ADAM
SAM ADAM
134 North LaSalle Street
Chicago, Illinois 60602
CEntral 6-5543
Attorney for Defendant

PROOF OF SERVICE

To: HONORABLE
JOHN J. STAMOS
State's Attorney of Cook County
2600 South California Avenue
Chicago, Illinois 60608

SAM ADAM, being first duly sworn on oath, deposes and says that he served a copy of the foregoing Notice with a copy of the foregoing Motion attached thereto upon the above named party at the above address by personally delivering said copies at the above address.

/s/ SAM ADAM
SAM ADAM
134 North LaSalle Street
Chicago, Illinois 60602
CEntral 6-5543
Attorney for Defendant

SUBSCRIBED and SWORN to before me this 28th day of April, 1967

Notary Public

STATE OF ILLINOIS)
COUNTY OF COOK) SS.
CITY OF CHICAGO)

THE MUNICIPAL COURT OF CHICAGO
FIRST MUNICIPAL DISTRICT OF
THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

67 690103

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

vs.

JOHN ADAMS, DEFENDANT

EXCERPT OF REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable KENNETH R. WENDT, Judge of said Court, on the 10th day of February, A. D., 1967.

APPEARANCES:

HON. JOHN J. STAMOS,
State's Attorney, by

GERALD EISEN, ESQ.
Assistant State's Attorney,
appeared on behalf of the People;

* * * *

THE CLERK: Raise your right hand, officer,

(Witnesses sworn.)

WILLIS NANCE,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EISEN:

Q Officer, your name nad assignment?
A Officer Willis Nance, assigned to the Vice Control Division, Narcotic Unit.

Q Calling your attention to January the 4th, 1967, at 1430 hours did you have occasion to be in the vicinity of Chicago and Orleans Streets, City of Chicago?

A Yes, sir; I was.

Q At that time and place did you have occasion to see the defendant?

A Yes, I did.

Q Tell the Court what occurred just prior to that time if anything.

A On the 4th day of January, your Honor, 1967, 1400 hours I had a conversation with a police informer at 1121 South State Street relative to making a control buy of narcotics from a person by the name of John. Informer was searched and found to be free of all monies and narcotics, and he was then driven to the vicinity of 18th and Wabash where he made contact with the defendant here.

Q Did you observe this?

A I observed the two of them come out of the tavern, yes. The Defendant and the informant boarded a bus and went to Orleans, and Orleans and Chicago, where I again saw the informer and the defendant alight from a bus. The defendant went into a telephone, went into a drug store, Rexall Drug Store on the corner and made a telephone call along side of Officer Williams. Moments later another person appeared down the street. This person here (indicating) left out of the drug store.

Q You mean the defendant?

A The defendant (indicating) left out of the drug store and walked a short distance north of the drug store on Chicago. The two of them had a brief, met momentarily there. This defendant here walked back on the east side of the street, walked south again. Officer—the informant came out of the drug store and joined this defendant here. Officer Williams followed behind the two of them until they got to Orleans and Chicago Avenue where the informant made a signal to Officer Williams that he had made the purchase of heroin which he gave to Officer Williams, and Officer Williams placed this defendant under arrest and informed him of this, why he was being placed under arrest at this time.

Q Did the officer remain in the drug store with the informant at that time?

A When this person, when the defendant left out of the drug store, the two of them was in the drug store together, yes.

Q Officer Williams?

A Yes.

Q Have you, have you talked to Officer Williams with regard to this case, and did Officer Williams state whether or not the informant had contacted with any other people in the drug store?

A No, no, no. The informant just stood along side of Officer Williams at the telephone booth in the drug store.

Q You had occasion to, you had occasion to transport the item recovered to the lab for analysis?

A Yes, I did.

Q And, I show you this lab report, F600119, that is the same true and correct analysis?

A Yes.

Q One foil packet containing .50 unknown white powder, tested by Charles Von Drak and found to be heroin. Did the SE inform you or officer Williams whether he actually made the buy in the conversation with the parties? Did you have a subsequent conversation with the SE? Did he say whether he brought—

A Yes. He indicated that he had just copped from, from the defendant here, John Adams.

Q Okay.

THE COURT: Did they recoup—

MR. EISEN: Q Did you search the defendant?

A Yes I did make a search of the defendant. He didn't have the money. He had given the money to the, person with him he had called.

THE COURT: Anything else?

April 28th, 1967

And the Court hearing Counsel for said Defendant in support of said Motion as well as the State's Attorney, Counsel for the People in opposition thereto and the Court being fully advised in the premises doth DENY

said Motion and orders that said Motion be and the same is hereby DENIED accordingly.

And the said Defendant by his Counsel now here answers he is ready for trial.

On Motion of the State's Attorney, Counsel for the People, it is ordered by the Court that this cause be and the same is hereby continued until May 2nd, 1967, without Subpoenas, at 1:00 P.M.

Form 53A

UNITED STATES OF AMERICA

State of Illinois,)
) ss.
Cook County,)

Pleas, made before a branch of the Circuit Court of Cook County, in said County and State, begun and held at the Circuit Court, in the City of Chicago, in said County, one thousand nine hundred and SIXTY SEVEN and of the Independence of the United States the one hundred and NINETY FIRST

Present: Honorable JOHN S. BOYLE
Judge of the Circuit Court of Cook County.

JOHN J. STAMOS
State's Attorney

JOSEPH I. WOODS
Sheriff of Cook County

Attest:

JOSEPH J. McDONOUGH
Clerk

And afterwards, to-wit: on May second in the year last aforesaid, there being present Honorable Jacques F. Heilingoetter Judge of the Circuit Court of Cook County, Illinois, JOHN J. STAMOS State's Attorney, JOSEPH I. WOODS Sheriff, and JOSEPH J. McDONOUGH Clerk.

The following among other proceedings were had and entered of record in said Court, which said proceedings are in words and figures following to-wit:

Gen. No. 67-641

THE PEOPLE OF THE STATE OF ILLINOIS

vs

JOHN ADAMS

INDICTMENT FOR UNLAWFUL SALE OF NARCOTIC DRUG

This day come the said People by JOHN J. STAMOS, State's Attorney and the said Defendant as well in his own proper person as by his Counsel also comes.

Plea of Not Guilty heretofore entered to the indictment in this cause.

And now issue being joined and the said Defendant and his Counsel now here propose to waive the intervention of a Jury and submit this cause to the Court for trial and the Court having fully advised the said Defendant of his right to a trial by Jury, the said Defendant still adheres to his proposition to waive such right and by agreement between the State's Attorney, Counsel for the People and the said Defendant and his Counsel, this cause is submitted to the Court for trial and the intervention of a Jury waived; which said Jury Waiver is filed herein and is in words and figures following, to-wit:

Jury Waiver signed

And the Court hearing the Testimony of Witnesses.

Stipulated age of Defendant JOHN ADAMS, is now about THIRTY SIX (36) years.

And the State's Attorney, Counsel for the People now here rests.

Counsel for said Defendant now here moves the Court at the close of the State's case, to find the said Defendant Not Guilty in this cause.

It is ordered by the Court that the hearing on the Motion in this cause be and the same is hereby continued until May 3rd, 1967.

DCS 1150 Form 53B

And afterwards, to-wit: on May third in the year last aforesaid, there being present Honorable JACQUES F. HEILINGOETTER Judge of the Circuit Court of Cook County, Illinois. JOHN J. STAMOS State's Attorney, JOSEPH I. WOODS Sheriff, and JOSEPH J. McDONOUGH Clerk.

The following among other proceedings were had and entered of records in said court, which said proceedings are in words and figures following to-wit:

Gen. No. 67-641

THE PEOPLE OF THE STATE OF ILLINOIS

vs

JOHN ADAMS

INDICTMENT FOR UNLAWFUL SALE OF NARCOTIC DRUG

This day come the said People by JOHN J. STAMOS, State's Attorney and the said Defendant as well in his own proper person as by his Counsel also comes.

This cause coming on before the Court for a hearing on the Motion to Find the said Defendant Not Guilty, heretofore entered here-in in this cause.

And the Court hearing Counsel for said Defendant in support of said Motion as well as the State's Attorney, Counsel for the People in opposition thereto and the Court being fully advised in the premises doth DENY said Motion and orders that said Motion be and the same is hereby DENIED accordingly.

And the Court hearing the further Testimony of Witnesses.

And Counsel for said Defendant now here rests.

And the Court hearing Testimony of Witnesses in Rebuttal.

Counsel for said Defendant now here moves the Court at the close of all evidence to find the said Defendant Not Guilty in this cause.

And the Court hearing Counsel for said Defendant in support of said Motion as well as the State's Attorney, Counsel for the People in opposition thereto and the Court being fully advised in the premises doth DENY said Motion and orders that said Motion be and the same is hereby DENIED accordingly.

And the Court hearing the Arguments of Counsel and being fully advised in the premises doth FIND the said Defendant JOHN ADAMS, guilty of unlawful sale of narcotic drug in manner and form as charged in the indictment.

Counsel for said Defendant now here moves the Court for a New Trial in this cause.

And the Court hearing Counsel for said Defendant in support of said Motion as well as the State's Attorney, Counsel for the People in opposition thereto and the Court being fully advised in the premises doth DENY said Motion and orders that said Motion be and the same is hereby DENIED accordingly.

Counsel for said Defendant now here moves the Court in Arrest of Judgment in this cause.

And the Court hearing Counsel for said Defendant in support of said Motion as well as the State's Attorney, Counsel for the People in opposition thereto and the Court being fully advised in the premise doth DENY said Motion and orders that said Motion be and the same is hereby DENIED accordingly.

And now neither the said Defendant nor his Counsel for him saying anything further why the judgment of the Court should not now be pronounced against him on the finding of guilty, heretofore entered and the judgment rendered to the indictment in this cause.

THEREFORE, it is considered, Ordered and adjudged by the Court that the said Defendant JOHN ADAMS, is guilty of the said crime of unlawful sale of narcotic drug in manner and form as charged in the indictment in this cause, on the said finding of guilty.

Testimony heard in Aggravation and Mitigation.

THEREFORE, it is Ordered and adjudged by the Court that the said Defendant JOHN ADAMS be and

he hereby is sentenced to the Illinois State Penitentiary for the crime of unlawful sale of narcotic drug in manner and form as charged in the indictment whereof he stands convicted, for a term of years not less than TEN (10) years, nor more than THIRTEEN (13) years, for the crime whereof he stands convicted, and it is further ordered and adjudged that the said Defendant JOHN ADAMS, be taken from the bar of the Court to the Common Jail of Cook County, and from thence by the Sheriff of Cook County to the Illinois State Penitentiary, and be delivered to the Department of Public Safety and the said Department of Public Safety is hereby required and commanded to take the body of the said Defendant JOHN ADAMS, and confine him in said Penitentiary, according to law, from and after the delivery thereof until discharged according to law, provided such term of imprisonment in said Penitentiary shall not be less than TEN (10) years, nor more than THIRTEEN (13) years, for the crime for which the said Defendant was convicted and sentenced.

IT IS FURTHER ORDERED that the said Defendant pay all the cost of these proceedings, and that execution issue therefor.

And the Court now here advises the said Defendant of his right to an Appeal.

Counsel for said Defendant now here enters and files Notice of Appeal in this cause; which said Notice of Appeal is in words and figures following, to-wit:

TO THE SUPREME COURT OF ILLINOIS

Appeal From the Circuit Court of Cook County
County Department—Criminal Division

Number 67-641

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

JOHN ADAMS, DEFENDANT-APPELLANT

HONORABLE JACQUES F. HEILINGOETTER Trial Judge

NOTICE OF APPEAL

An Appeal is hereby taken from the final Judgment entered in the above entitled cause.

Appellant's Name: John Adams
Appellant's Address: County Jail
The name and address of Appellant's Attorney:
Name of Attorney: Charles B. Evins & Sam Adam
Address: [Illegible]
Telephone: [Illegible]
The Offense: Sale of Narcotics
The Judgment: Guilty of Sale of Narcotics on a (Finding) (Verdict).
The Date: May 4, 1967
The Sentence: Ten to Thirteen Years

/s/ John Adams
Defendant-Appellant

By: /s/ [Illegible]

Dated May 3, 1967

[Filed, May 3, 1967, Joseph J. McDonough, Clerk of the Circuit Court, Criminal Division]
Louis J. Garippo

Direct Inquires to: John J. Altman
Associate Clerk-Criminal Division
2600 South California Avenue
Chicago, Illinois, 60608

Notice of Appeal
Index of Witnesses on the trial
Oral Argument on Motions

THE CLERK: The People of the State of Illinois versus John Adams.

MR. EVINS: Good morning, Judge.

THE COURT: Good morning.

MR. EVINS: Judge, this is Mr. Adam, my associate and partner in this case.

MR. ADAM: Good morning, Judge.

THE COURT: Good morning.

MR. EVINS: Judge—

THE COURT: Yes?

MR. EVINS: —we are ready for trial today, but at this time I would like to present to the Court our motion to dismiss this indictment on the grounds that at least one of the principle points he alleges at the time of the Preliminary Hearing in this matter, the defendant, Mr. Adams, in this case was not represented or furnished Counsel; and you have a document there before you which incorporates all of our reasons set forth.

MR. FLAUM: Your Honor, the State, through myself, has not been in receipt of a—

MR. ADAM: You have not?

MR. FLAUM: —any motions.

MR. ADAM: Judge, we filed our Motion To Dismiss The Indictment; notice of proof of service in the State's Attorneys Office yesterday.

MR. FLAUM: I have not received it, your Honor. I checked my individual mail slot this morning, it was not there, and now, perhaps, it is in our office, but I have not been in receipt of it yet.

THE COURT: Do you want to pass this for a moment?

MR. FLAUM: If any other motions are to be presented to your Honor, let him present them now, and we might then pass this so we can check.

MR. EVINS: One other motion. Mr. Adam will present that one.

MR. ADAM: Judge, that is a motion also for a Bill of Particulars. Specifically, we are asking: "When, where,

what time the alleged offense and sale of narcotics were perpertrated." We are also asking the amount of money allegedly used in order to perpertrate it. We are also asking that the correct and true and accurate name of the alleged purchaser known at the time, Al Nichols, be furnished to the defendant and his attorney; and his present address and phone number; or in the alternative, we ask that he be made available prior to trial for us to interview him.

MR. EVINS: We can interview him this morning.

MR. FLAUM: Your Honor, with all respect to Counsel, I think the State ought to have a little time to puruse the motions which come at a late hour. So, I suggest that we pass this so that I can at least obtain a copy of the motions.

MR. EVINS: I have a copy.

MR. ADAM: Here they are. Yes, Mr. Townsend filed them yesterday. Those are my copies.

THE COURT: We will pass this for a few minutes.

(Short recess taken.)

(After an interval of time the following proceedings were had in the above-entitled cause.)

THE COURT: Proceed with these motions.

MR. FLAUM: Fine, your Honor. Your Honor, may we proceed?

THE COURT: Yes.

MR. FLAUM: Ready to proceed, Mr. Adam?

MR. ADAM: Yes.

MR. FLAUM: Your Honor, turning first to the Bill of Particulars, point one, it asks for "Where and what time the alleged offense occurred." I already informed Mr. Evins our information is that the offense occurred on January 4, of this year, 1967; approxiamtely 2:30 to 3:00 o'clock in the afternoon; the area of Orleans and Clark. How that alleged sale was perpertrated, we suggest is evidence and unable answer at this time. With regard to point three, the money allegedly to have been used to commit the offense, we have given the sum to the counsel for the defendant. Point four, speaks of the true and correct name of the purchaser in this case, and

our information is that his proper name is Albert Bradley. Five; your Honor, we suggest all the said information independant and applicable to each count in an indictment such as this cause is vague.

THE COURT: Anything else you want to say in this connection, Mr. Adam?

MR. ADAM: With regard to this motion, Judge, there is one other thing that is this: we are also, although we may not have specified it in the motion, nonetheless, in authorities that we have cited to you Roverio vs United States, footnotes, we are also asking for the opportunity prior to trial to interview and to discuss the testimony of Albert Nichols alias Albert Bradley, with him, prior to trial, because he is a witness for the State and we are—

THE COURT: You said something initially about asking in the alternative about the names that he be present. Is it the State's intention to call him? Will he be present?

MR. FLAUM: Yes, your Honor, it is the State's intention to call such parties and all State's witnesses will be in Court prior to Court and available.

MR. ADAM: Fine.

THE COURT: I think that covers everything, then?

MR. FLAUM: Yes.

THE COURT: I would deny that one, number two, I believe Mr. Adam indicated, "How and what manner—"

MR. FLAUM: And five, your Honor?

THE COURT: I do not understand specifically what is meant by that, Mr. Adam.

MR. ADAM: Where is that?

THE COURT: With regard to five.

MR. EISEN: Counsel will waive the normal written Bill of Particulars?

MR. ADAM: Yes.

MR. EVINS: Yes.

MR. ADAM: Yes, Judge, five refers—it has been answered by the information that we have been given, that has been furnished to us in four.

THE COURT: I see.

MR. FLAUM: So that concludes that motion, your Honor.

Turning to the Motion To Dismiss The Indictment, which we ask to be denied on the basis that this motion that the defendant filed failed to have counsel appointed for him at the preliminary hearing, before the Honorable Kenneth R. Wendt; your Honor, is well familiar with the authority which does not require the appointment of counsel without demand at the preliminary hearing, in that the record does not reflect any such demand. For authority on this we cite People versus Morris, 30 Illinois 2nd, 406, cited in 1954.

MR. ADAM: People versus Nicks you said?

MR. FLAUM: Morris.

MR. ADAM: Morris. Judge, if I may answer that briefly?

THE COURT: Yes.

MR. ADAM: First of all I ask the State to first stipulate about the question in the latter that the defendant was not provided with counsel at the preliminary hearing. We set forth the transcript as an exhibit to our motion so that will not come up again.

MR. FLAUM: Your Honor, the State will not enter into that stipulation.

THE COURT: I did not hear?

MR. FLAUM: The State will not enter into that stipulation.

MR. ADAM: Well, then, Judge, we revert to Old Common Law Pleading, what is alleged and not denied is admitted. You remember those "Old Common Law Days?"

MR. EVINS: Yes, I remember.

MR. FLAUM: Your Honor, we have not had an opportunity to examine the record in depth, and we feel that regardless of the position taken below, in the courts, that the motion falls; by way of the authority, People versus Morris, regardless of any warning regarding Counsel—

THE COURT: I can appreciate this, Mr. Adam, we all know that the State just looked at these motions now—

MR. ADAM: Yes.

THE COURT: —they would not be in any position to stipulate to this.

MR. ADAM: Judge, will you allow us to have the defendant sworn?

THE COURT: Swear the defendant, please.

JOHN ADAMS,

was called as a witness on behalf of himself, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. EVINS:

Q Your name is what?

A John Adams.

Q And you are the defendant in this case, are you not?

A Yes, sir.

Q And Mr. Adams, you were interrogated in a preliminary hearing in this building, Branch 57, were you not?

A Yes, sir.

Q Were you not?

A Yes, sir.

Q And what is the date of that?

MR. EISEN: February 10.

MR. EVINS: Q Or on or about February 10, you were in Branch 57, Narcotics Court, is that right?

A Yes, sir.

Q And at that time there were certain—you were the defendant in this case, is that right?

A Yes, sir.

Q And that case, which is entitled the Case of the People of the State of Illinois versus John Adams, charge is Unlawful Sale of Narcotics, which was and is the same case for which you have be subsequently been indicted, is that right?

A Yes, sir.

Q And at the time that you appeared there at this preliminary hearing, you appeared before Judge Wendt, is that right?

A Yes, sir.

Q Now, did you have an attorney, a lawyer representing you at that hearing?

A No, sir.

Q Did Judge Wendt appoint an attorney to represent you at that hearing?

A No, sir.

MR. ADAM: That is all.

MR. EVINS: That is all.

THE COURT: Yes.

MR. FLAUM: We have no questions, your Honor. I would like to make just a short reply with regard to the inability of the State to stipulate that the record furnished by the defense in this cause as an appendix to the motion to dismiss the indictment reflect why we are unable to at this time to make any stipulation. Counsel just asked the defendant under oath if he were interrogated and no where in this record is the defendant in any way appear by way of questions and answers or in any verbal statement. It is for that reason, your Honor, that the State cannot enter into a stipulation as I am sure the defense can appreciate.

MR. ADAM: Yes.

MR. EVINS: Yes.

Q Let me ask you this: there was certain evidence that was taken at that preliminary hearing before Judge Wendt, was there not?

A Yes, sir.

Q Certain officers for the State testified?

A Officers.

Q Is that right?

A Yes, sir.

Q And they testified in your case which you were the defendant, is that right?

A Right. Yes, sir.

Q And after they testified you then were held to the Grand Jury, right?

A Right. Yes, sir.

MR. EVINS: That is all.

MR. ADAM: Judge,—

THE COURT: Yes?

MR. ADAM: —I would say this there is only one case in the State of Illinois, and that is the case I have cited pardon me, that the State cited on this question, and that is the case of People versus Morris. However, I want to point out to your Honor, that People versus Morris was decided before Escobedo versus Illinois; before Miranda versus Arizona and more important, it was decided previously to the Illinois Statutes. And the Illinois Statute, I think we have set forth this, 1—8-1 or 109-1, compels and makes it non-discreationary with the Preliminary Hearing Court to appoint counsel. It is not a matter which the Judge may do. It is a matter which he shall do. And the Judge was derelict in his duties and failed to perform the act required of him by the Illinois Legislature, by their statute, which, as I say, was a statute successfully enacted after People versus Morris. And the only remedy that a defendant had, who had been indicted has in such a situation would be to move the court to dismiss the indictment and remand the case, or to just to dismiss the indictment and have the State proceed, if they elect to so proceed, with a preliminary hearing in this matter, as the defendant is entitled to under the statute.

MR. FLAUM: Your Honor, in response, we would only say that while admittedly, People versus Morris was decided prior to Escobedo and Miranda, the law in Illinois, and we believe under the holdings of the Supreme Court has not afforded the critical stage of the proceeding to become that of a preliminary hearing. I ask your Honor to note in that record before him the defendant in no way implied he has been. Now, he is represented by two able counsel, Plea of not guilty entered, I believe is entered at this time. So, your Honor, we feel that the motion, based on those representations should be denied.

MR. EVINS: Which time are you referring to, Counsel, Mr. State's Attorney?

MR. FLAUM: That time, plead not guilty at the preliminary hearing, is that correct.

MR. EVINS: And you said that he was represented by two able counsel?

MR. FLAUM: No.

MR. EVINS: When was this?

MR. FLAUM: I said presently he is represented by two able counsel, and has been for sometime.

THE COURT: You are not going to debate that, are you?

MR. EVINS: Yes, that is quite debateable.

MR. ADAM: I would not debate that.

THE COURT: Is there anything further, gentlemen?

MR. EVINS: That is all, Judge.

* * * * *

"The court does not believe that the preliminary hearing is a critical stage. Therefore, the motion will be denied."

Further Oral Argument on Motions

WILLIS NANCE, called as a witness on behalf of the People, having been first duly sworn on oath testified as follows:

DIRECT EXAMINATION

BY MR. FLAUM:

My name is Willis Nance. I am a Chicago Police Officer assigned to Vice Control Division, Narcotic Unit. I been so assigned for three years.

On January 4, 1967, Officer Williams and I met with a special employee named Albert Bradley at 1121 South State Street. After having a conversation with Mr. Bradley, I searched him and found him to be free of money and narcotics. He was given $19.00 in pre-recorded funds for which he signed. He was then driven to 18th and Wabash where he entered a tavern. He later came out with a person now known to me to be JOHN ADAMS.

Q What if anything did you do after that conversation with Mr. Bradley?

A Moments later I saw Mr. Bradley and Mr. Adams leave the tavern and they were walking across the street and boarded a bus on the northeast corner.

Q What if anything did you do, Detective Nance?

A I proceeded to the area of Orleans and Oak Street in which Mr. Bradley, the informer, had told us—I proceeded to Orleans and Oak Street as we had previous arranged. I saw the informer and Mr. Adams in the area of a drug store on the Corner of Oak and Orleans. I parked the car about a half block north of the drug store and Officer Williams left the vehicle. I circled the block several times in this particular area. About fifteen minutes later I saw Officer Williams with the Defendant in custody.

CROSS EXAMINATION

BY MR. ADAM:

I made a police case report of the events of January 4, 1967. The report contained the events surrounding the controlled purchased of narcotics, and the arrest of the defendant. I testified before the Grand Jury and the informer was also called as a witness and testified.

I first met the informer about 1:30 on January 4, 1967, at the Narcotic Unit. I arrested the defendant about an hour later. I had a conversation with the informer at the narcotic unit and Officer Williams and I drove the informer to 18th Street and Wabash Avenue. The informer got out of the car and went into a tavern. Officer Williams and I remained in the car. Officer Williams did not enter the tavern. I did not go into the tavern. The informer came back to the car and we left the area. I don't know where the defendant was when the informer came back to the car.

MR. ADAM: Q Now, I ask you, Officer Nance, to look at the document that I am handing to you and tell his Honor what the document is?

A This is a general case report, sir.
Q And is this your case report?
A Yes, sir, I would say this was my report.
Q And now, I ask you to look at this case report and look as it and tell his Honor whether you made this case report out, so there's no question about it being your case report? Did you make this out?
A To the best of my ability, Mr. Adam, yes, sir.
Q And when you made it out, did you put on there the day you made it out?
A Yes, sir, the date, yes, sir.
Q What date is that?
A The 4th of January, 1967.
Q And that would be the same day as the event, the day of this alleged offense, is this correct?
A Yes, sir.
Q And now, in that report which you made out on the same day, did you state in there that the informer went into the tavern at 18th and Wabash?
A It is not in the report here, sir.
Q Did you make out any written memorandum in which it stated that the informer went into a tavern?
A Not to my knowledge, sir, I can't recall.
Q Well, if there were any written memorandum, it would be in that report, wouldn't it? There is no other written memorandum, is there?
A Yes, I assume it would be, sir, yes, sir.
Q When you say you assume, you mean you didn't make out any other memorandum, is that right?
A Perhaps you could say that, sir.
Q Well, would you say that?
A Repeat the question?
Q Would you say that this was the only written memorandum of the events and occurrences of January 4, 1967 that you made out, or that you have seen?
A Yes, sir, I would say so, sir, yes.
Q Now, in that written memorandum or case report, do you say anywhere in there that the informer came back to your car at 18th and Wabash after you let him out?
A What is the question, Mr. Adam?

Q Did you say in your report that you let the informer out of your car and that he came back to your car?

A In the report, no, sir.

Q After the informer came back to your car, did he get in the car?

A Yes, sir.

Q And where was the defendant at that time, if you know?

A I don't know, sir.

Q Did you ever know the defendant prior to this day?

A No, sir.

Q How long was the informer in the tavern prior to his coming back to your car?

A A very short while, sir.

Q Five minutes?

A Perhaps, sir.

Q And now, after the informer came back to your car and got in your car, did he get out of your car?

A Yes, sir.

Q And where did he go then?

A I don't know, sir.

Q Where did you go?

The informer got out of the car, I don't know where he went. He walked toward the alley to the corner of the alley and he disappeared from my vision. I do not know where he went. Officer Williams did not follow him, nor did I. About five minutes later the informer returned to the car alone.

Q Up to this point you had not seen the defendant?

A No, sir.

The first time the informer came back to the car he got into the car and sat on the rear seat.

Q And then, he left again, is that right?

A Yes, sir.

Q Now, where did he go this time?

A I don't know. He went in the same direction in which he went the first time.

Q And now, he went in the same direction and disappeared in the same spot, is that right?

A Yes, sir.
Q Did you follow him the second time, this time?
A Yes, sir, I got out of the car the second time, yes.
Q And you followed him?
A I stood at the mouth of the alley, mouth of the alley.
Q Did you see where he went?
A No, sir.
Q What did Officer Williams do?
A I assume he sat in the car. Officer Williams did not come to the mouth of the alley with me. The informer was out of my vision for four or five minutes the second time. This time he appeared in front of the tavern with Mr. Adams. The informer and Mr. Adams walked across the street to the northeast corner of 18th and Wabash and got on the bus.
Q Did you see them get on the bus?
A Yes, sir.
Q Did you follow the bus?
A Yes, sir.
Q Where did you go?
A I went in the area of Orleans and Oak, sir.
Q So you did not follow the bus there, did you?
A No, sir.
I got there before the bus. I don't know whether they got off the bus or not.
Q And when you got there, did you see the defendant and the informer alite from the us?
A I can't really recall, sir, but I did see them in that area, sir.
Q Well, you don't know, then whether they got off the bus or not?
A No, sir.
Q Prior to coming there?
A No, sir.
Q And as far as you know, the informer could have gone anywhere with or without the defendant prior to your seeing them at Oak and Orleans, isn't that right?
A Yes, sir.
Q Now, how long a period of time elapsed from the time you saw them board the bus at 18th and Wabash and at the time you saw them at Oak and Orleans?

A May 15 minutes or so, 20, it would be a little more either way. I saw the informer and Mr. Adams walking toward the drug store. Officer Williams had alited from the car and I assume he was in the drug store. I did not see either one of them enter the drug store. The car was parked a half block north of the drugstore.

Q Did you see him enter the drug store?

A No, sir, I can't say that I saw him enter.

Q How long a period of time elapsed between the time Officer Williams got out of the car, walked back toward the drug store, and the time you saw the Defendant and the informer walk toward the drug store, how long a period of time elapsed?

A Perhaps more or less simultaneously, I would say. Officer Williams beat them into the drug store maybe a minute or two.

Q And you just sat in the car?

A Yes, sir. I moved the squad car from time to time so I wouldn't be made to be sitting right there.

Q Were you parked north or south of the drugstore?

A I parked north of the drug store, sir.

Q So when you looked back at the drug store, you were looking through your rear view mirror, is that it?

A Yes, sir, either way, either looked back or either looked through my rear view mirror.

Q And now, after they were in the drug store for a period of time, how long before you first saw either Officer Williams, the informer or the defendant?

A Well, I saw Mr. Adams right—Mr. John Adams, that is, right away.

Q Coming out of the drug store?

A He came out of the drug store after, maybe 5 or 10 minutes, maybe.

Q And Officer Williams and the informer remained in the drug store?

A Yes.

Q And when Mr. Adams came out of the drug store, this was the first of the three that you saw, is that right?

A Yes, sir.

Q Now, you do not know what any of the three did in the drug store, do you?

A No, sir.

Q And you saw Mr. Adams leave the drug store alone, is that correct?

A Yes, sir, he walked around the block.

Q Completely around the block?

A There is a little—there's a little lot there, little cut-off spot, half a block, yes, sir, he walked around the block.

Q And was he out of your vision?

A For a moment he was, yes.

Q And you saw him meet with another man, you said?

A Well, when he got back to where he started from, then, about that time, the other male Negro appeared on the corner with Mr. Adams.

Q And they just talked, is that right?

A So far as I know.

Q You could not hear what they said?

A No, sir.

Q You were in the car?

A Yes, sir.

Q You were driving around the block?

A Yes, sir.

Q And so while you were going around the block, as they were standing there, talking, or whatever they were doing, you couldn't see them during this period of time, could you?

A Well, let me explain this to you this way; at the time I first saw Mr. Adams come out of the drug store, or where he came from, and walk around the little short block, the other male Negro appeared at the time he circled the block. He took his time walking around the block. I moved the squad car from where I was, thinking they were going to come and stand right up where I was, so I moved the squad car right at this time.

Q I see. And after you moved the squad car, while you were moving the squad car, you were watching the traffic, weren't you?

A Of course, sir.

Q You are a careful driver?

A Yes, sir.

Q And being a careful driver, you were watching other traffic, and so forth, on this two-way street, isn't that right?

A Yes, sir.

Q And also, you were going around the block, so that no one would observe you were watching, isn't that right?

A The only time I went around the block was later on, right at the time that they had made contact with each other, I moved the squad car.

Q When you say contact, you mean talk?

A Talking to each other, yes.

Q Now, did you see the defendant walk back towards the drug store?

A I saw him cross the street, and then when I got back around the block, I did, eventually, back around. I didn't see anybody.

Q Not even Officer Williams?

A No, sir.

Q Did you see the defendant walk to the drug store?

A No, sir, the defendant, the last time I saw the defendant, he crossed the street on the east side and began to walk south, and at that time I moved my car.

Q So that the next time after that you saw the defendant was when he was under arrest?

A Yes, sir.

I had a conversation with the defendant in the presence of Officer Williams and Albert Bradley. The defendant was then taken to 11th Street searched and processed.

Q Did you find any narcotics on his person?

A No, sir.

Q Did you find any marked money?

A No, sir.

Q Had the money, the serial numbers of the money been pre-recorded before you gave it to the informer?

A Yes, sir.

Q Had you dusted the money with flourescent powder?

A No, sir.

Q Had you put a wire recording device on the person of the informer prior to leaving 11th Street?

A No, sir.
Q Did you search the informer at 11th Street?
A Yes, sir.
Q This is prior to going to 18th and Wabash?
A That's correct, sir.
Q Where was the informer released?
A In the rear of the tavern.
Q No, I don't mean that, where was the informer released after the defendant was arrested?
A We put him in one room and the defendant in another room, sir.
Q And then you just let the informer go, is that correct?
A Yes, sir.
Q He wasn't searched a second time, was he, at 11th Street?
A Not to my knowledge, sir.
Q You didn't search him?
A The informer?
Q Yes.
A Not to my knowledge, sir.
Q You didn't see anybody search him?
A Not to my knowledge, sir.
Q I am talking about after the arrest, he was not searched again.
A No, sir, not to my knowledge.

The informer does not have any cases pending on him at this time to my knowledge. He may have had some pending on January 4, 1967. I appeared in Felony Court with him on a case. I don't know whether this was prior or subsequent to January 4, 1967. I believe he was charged with Criminal tresspassing. I spoke to the State's Attorney regarding his case. He asked me to help him out and I told him I would try. I don't recall what happened to the informer's case.

MR. ADAM: Q Well, prior to the 4th of January, 1967 did you appear with the defendant—with the informer at any other place, in order to help him with other pending charges, other than the one you just testified to?
A Yes, sir, I might have.

Q Well, would this be narcotics court?
A Yes, sir.
Q Is the informer a narcotic addict?
A Yes, sir.
Q Did you pay the informer for your information?
A We sometimes give the informer money.
Q Well, we are not talking the informer, we are talking about this informer. Did you pay him for this transaction?
A I would answer yes.
Q You did pay him?
A Yes, sir.
Q How much money did you pay him?
A It varies, sir.
Q Well, how much did you pay him in this case?
A Oh, 10 or 15 dollars sometimes, sir, it depends on his needs, I guess.

* * * *

I don't know what the informer's intake of narcotics was on January 4, 1967. I have an opinion of the informer's addiction on January 4, 1967. My opinion was that the informer was an addict.

I questioned Mr. Adams at the scene and again at 11th Street. Some of the time the informer was present. I tried to leave an impression on Mr. Adams that the informer was under arrest at the beginning.

* * * *

Q All right. Now, did you ever recover any money?
A No, sir.
Q None of the marked money was recovered.
A No, sir.

REDIRECT EXAMINATION

BY MR. FLAUM:

I parked my car in the rear of the tavern and Mr. Bradley exited from the car. He was gone four or five minutes and he returned back to the car. When he left the car this time I followed him to the mouth of the

alley. I saw Mr. Adams and Mr. Bradley board a bus.

Q What if anything did you do next?

A I went back to the squad car and drove to the area of Orleans and Oak Street.

ALBERT BRADLEY, called as a witness on behalf of the People, having been first duly sworn, on oath and testified as follows:

DIRECT EXAMINATION

BY MR. EISEN:

My name is Albert Bradley. I am also known as Al Nichols. Bradley is my true name. I reside within the City of Chicago, on the south side. On January 4, 1967 at about 1:30 in the afternoon I went to 1121 South State Street. I met with Officer Nance and Officer Williams. I had a conversation with them. After the conversation I was taken in the back room and was searched, found to be free of money and narcotics and I was given $19.00 in recorded money of which the serial numbers had been recorded. Officer Williams, Nance and myself then drove to 18th and Wabash. They parked the car in the parking lot and I got out of the car and went in the tavern known as "57 Club".

Q What happened at the tavern?

A Then I contacted the defendant.

Q And how did you get in contact with the defendant at that time?

A On the telephone.

Q Who made the telephone call?

A I got someone to make the call.

Q Do you know who made the telephone call?

A Yes, I do.

Q And who was that?

A His brother.

* * * *

I talked to the person on the phone. The person that I talked to was the Defendant Adams.

* * * *

Q And what is the defendant's name?
A John Earl.
MR. ADAM: John what?
THE WITNESS: John Earl.
MR. EISEN: Q Is that all you know as?
A That's all I know him as.
Q You say you talked to John Earl at that time on the telephone?
A Yes, I did.
Q And would you relate the conversation that you had at that time, to the Court?
A I told him I had some money and I wanted to cop.
Q And what does the word "cop" mean to you?
A It means to buy some narcotics.
Q Is that a common street term?
A Yes, it is.

* * * *

I told John Earl I wanted to cop and he said he would bring it down.

* * * *

Q And then what did you do at that time?
A Stayed in the tavern and waited on him, and went back and informed Officer Nance what I was going to do.
Q When you went back to inform Officer Nance, where did you go?
A I went back to the parking lot where he was parked.
Q With Officer Nance when you went back to the car?
A Yes, I did.
Q And after you had that conversation, what did you do?
A I waited until John Earl came.
Q And where did you wait?
A I waited in the tavern.
Q You went back to the tavern then?
A Yes.
Q Approximately how long did it take for John Earl to come there?
A Oh, about 15 minutes, something like that.
Q And where did you meet John Earl there?

A In the tavern.
Q What occurred in the tavern at that time?
A What occurred?
Q Yes.
A He asked me where did I get the money from, because he knew I didn't have any money earlier.
MR. EISEN: Q Who asked you that?
A John Earl.
Q And what was your reply?
A I told him I got it from a friend.
Q What did you then do at that time?
A At that time I gave him the money, and we proceeded to go—
Q Did you say you gave him the money. What money was this?
A The recorded money.
Q You gave this to him in the tavern at that time?
A Yes.
Q And what did you do?
A From there we left there and caught a bus and went to the north side, to Chicago Avenue, and from Chicago Avenue goes down to Orleans.
Q Was this on the bus, the Chicago Avenue bus?
A On the bus.
Q And now, from the time you met the defendant until the time you got to Chicago Avenue and Orleans, did he ever leave your presence or did you ever leave his presence, or were you with him at all that time?
A All the time until we met the person he was supposed to meet, yes.
We went to the Rexall Drug Store on the corner of Orleans and Oak Street. Officer Williams was in the drug store. The defendant made another phone call, and I over heard the conversation. The defendant told the party that he was here.
Q What then happened?
A And then the defendant met with another man, right on the corner, I'll say about 25 or 30 feet, you know, from the corner.
Q And how long did it take before the other man arrived?

A About 10 minutes, something like that.

The Defendant met with another male and they crossed over the street to the east side and he beckoned for me. I came out of the drug store and walked across the street and received the package and gave it to Officer Williams.

* * * *

Q When you say you walked, where were you walking to?

A To catch the bus.

Q On Chicago Avenue?

A Yes.

Q And what happened when you reached Chicago Avenue and Orleans?

A Officer Williams pulled us off the bus, as soon as we were stepping on the bus.

CROSS EXAMINATION

BY MR. ADAM:

I did not make a written statement regarding the events that occurred on January 4, 1967. I testified before the Grand Jury. I was given $19.00 in prerecorded funds and I went to 18th and Wabash. I went there by car. Officers Williams and Officer Nance were with me. It was a cold day. The car was parked in a parking lot behind the Calvert Hotel. I got out of the car and went in a tavern named the 57 Club. I met the defendant's brother in the tavern. The defendant's brother is named Joe something. I don't know his last name. I asked him for the defendant's telephone number and he dialed the number for me. I did not see the number he dialed. I don't know the defendant's telephone number. I don't know where his brother called to. I spoke to the defendant on the phone.

Q And now, tell us again all that conversation that you had on the telephone?

A All of it?

Q All of it?

A I just told him I had some money and I wanted to cop.

Q That's all you said, hello, and I have some money, I want to cop, is that right.
A That's what I told him.
Q And what did the voice say?
A He said, "I will be right down."
Q And what did you say?
A I said, "Okay."
Q And what did the voice say?
A No one said nothing else after that.

After the phone call I went back to the car where Officers Williams and Nance were parked. I did not get into the car. They did not get out of the car to my knowledge. I went back into the tavern.

Q When you got back into the tavern, was the Defendant there?
A No.
Q How long a period of time elapsed before the defendant arrived?
A About 10 minutes.
Q And how long a period of time elapsed between the first time you went in the tavern, before you made phone call, and to the time when you finally saw the defendant?
A What did you say?
Q How long a period of time elapsed between the time you first arrived at the tavern, prior to making the phone call, and the time you first saw the defendant?
A What did you say?
Q How long a period of time elapsed between the time you first arrived at the tavern, prior to making the phone call, and the time you first saw the defendant?
A Oh, about 15, 20 minutes, something like that.
Q And there were some other people in the tavern?
A Yes.
Q How many would you estimate?
A I wouldn't know.
Q Ten?
A I wouldn't know.
Q Twenty?
A I wouldn't know.
Q More than one?

A Yes, more than one, definitely more than one.
Q Did you have a conversation with any of these people?
A In the tavern?
Q In the tavern?
A Yes.
Q Who else besides Joe?
A I don't know.
Q Do you remember anybody else you had a conversation with?
A No, I don't.
Q Did you go to the washroom?
A Did I go to the washroom?
Q Yes, did you go to the washroom?
A I don't remember that I went to the washroom or not.
Q Did you have anything to drink?
A Did I have anything to drink?
Q Yes, did you have anything to drink?
A Yes, I drank a coke.
Q In the tavern?
A In the tavern? Yes, in the tavern.
Q What did you drink in the tavern?
A A coke and some wine.
Q How much wine?
A Oh about, it was about, oh, that much. (Indicating.)
Q When you say that much, you are pointing with your two fingers, an inch and a half, is that right?
A Inch and a half, yes, approximately.
Q Was that a shot glass or out of a bottle?
A It was out of a bottle.
Q Did you buy it?
A Yes.
Q Did you buy it with the $19 that was given to you?
A No.
Q You had other money?
A Did I have other money?
Q Yes. Did you have any other money other than the $19?
A No.

Q Well, how did you buy it, then?
A When I went into the tavern.
Q What did you buy it with?
A I got 60 cents.
Q Then you did have other money?
A No, not on me, no.
Q Where did you get the 60 cents?
A From a guy in the tavern.
Q You borrowed it from him?
A No, I didn't borrow it, I just said I wanted a taste.
Q So you took his 60 cents?
A Whose 60 cents?
Q The guy in the tavern?
A One of the studs.
Q You took one of the studs' money?
A Did I take the studs' money?
Q Yes, can't you understand my questions? Did you take this money and buy some wine?
A No, I didn't take the money.
Q Well, how did you get the money to buy the wine?
A They bought it.
Q Who bought it?
A Someone I was drinking with in the tavern, who it was I do not remember.
Q You can't remember the name?
A No.
Q Did you ever know his name?
A How can I know something when I don't remember?
Q How can you know something when you don't remember. I don't know.
Q Did you have any other money, other than the $19 given by Officers Williams and Nance?
A No, I did not.
Q In what denomination was this money?
A I don't know.
Q You signed for it, didn't you?
A Yes, sir.
Q Did you look at it when you signed it?
A Yes.

Q Was there a $10 bill?
A I don't know.
Q Was it all one's?
A I don't know.
MR. FLAUM: Your Honor, the witness has answered, it has been asked and answered. He says he doesn't know. He has asked that question about three times?
MR. ADAM: Q How do you know there was $19?
A I know there was $19.
Q How do you know it?
A Because I can count.
Q You remember counting it?
A Yes, I had counted it when I received it.
Q You counted the money when you received it. Was it all in bills or was there some change?
A It was in bills.
Q All in bills?
A All in bills.
Q Can you remember if there were any one's?
A There have to be some one's if it is $19, that's common sense. After the defendant's arrival I did not go back to the car where Officers Nance and Williams were.
MR. ADAM: Q Did you see Officer Williams and Officer Nance again at 18th and Wabash?
A Did I see them again at 18th and Wabash?
Q That's the question.
A No, I didn't see them no more, until we got to the north side. I had a conversation with the defendant early that day.
Q Where was that conversation?
A In my house.
Q Where do you live?
A 1820 something, South Michigan.
Q Where do you live now?
A Where do I live now?
MR. EISEN: Object.
MR. ADAM: Q Where do you live now?
THE COURT: Sustained.

MR. EISEN: Objection, immaterial.

MR. ADAM: Q The other day when we asked you questions in the back room you wouldn't answer them, would you?

A No, I wouldn't.

Q Were you afraid you would incriminate yourself?

A No.

A No.

MR. EISEN: I object to this line of questioning, your Honor.

THE COURT: Sustained.

MR. ADAM: Q Did Officer Williams tell you not to answer them?

MR. EISEN: Objection.

THE COURT: Sustained.

Q Fine, Now, did the defendant come by your house on January 4, 1967?

A No, he spent the night there.

Q With you?

A Yes.

Q Did you tell him that morning that you wanted to buy $19 worth of narcotics?

A No, I did not.

Q Did you tell him—

Where did he sleep that night?

A He slept on the couch.

Q Where did you sleep?

A In the bed with my wife.

Q He was your house guest?

Q Was he a house guest?

A He was just up there.

Q He was just up there?

A Yes, sir.

Q Who else was there, besides you and your wife?

A That's all.

Q And he was a guest in your home?

A Was he a guest in my home?

Q Yes. Can't you understand what I am asking you? Was he a guest?

A He was just there.

Q Well, he was there with your permission, wasn't he?

A Yes.

The defendant was in my home as a visitor. He was there with my permission. He wasn't my friend. He was a person that I knew. I let him sleep in my house. This is the first time I ever let him sleep there. He was not a friend of my wife.

Q Did he ask for permission to sleep there?

A Yes.

Q And did you rent him a room?

A No, it's just one room.

Q And you let him stay there?

A Yes.

Q Had you been out with him previously?

A Yes.

Q Where had you been?

A Out on the street somewhere.

Q Where?

A I don't know, just out on the street.

Q You don't remember where it was?

A Just out on the street.

Q Did you drink together?

A Had we been drinking together? Yes, we had.

Q You came back together that night?

A Yes, sir, we did.

Q And he stayed there with you?

A Yes.

Q And this is just a person—how long have you known him?

A Oh, a number of months.

I was not using narcotics that particular day.

Q How long had it been since you had some?

A Day before that.

* * * *

Q When is the last time you had a shot?

A I think it was last Wednesday, something like that.

Q Almost a week?

A Yes.

Q You haven't had a shot in a week?
A No.
Q Where did you give yourself a shot?
A Where did I give myself a shot?
Q Yes.
MR. EISEN: I will object to that.
MR. ADAM: Q Did you put it in your arm?
A No.
Q Did you put it in your leg?
A No.
Q Where did you take it?
A In my hand.

* * * * *

Q All right. How long have you been a police informer?
A Oh, for about 15, 16 months, something like that. The people on the street call me a stool pigeon and the Police Department calls me an informer. Officer Nance and Williams are my friends.
Q And now, did they pay you for this?
A Pay me for what?
Q This transaction?
A No.
Q You never got any money from this.
A Not for making any money.
Q What did you get money for?
A If I wanted something to eat, a few dollars for that, my rent may be behind.
Q They paid for your rent, too?
A If I needed it.
Q Are you working?
A Am I working?
Q Yes.
A Right now?
Q Yes.
A No, I got too many cases to be working right now.
Q What do you mean, cases?
A I got to come to court too often.
Q For your own cases?
A No, I have no cases.

Q You mean to testify?
A Yes.
Q You are a professional stoop pigeon?
A Yes, I am.
Q You go around testifying against people.
A Yes, I do.
Q And now, do you get paid for testifying against them?
A No, I don't.
I am not employed. My wife is not working.
Q Well, you get money everytime you testify, don't you?
A No, I don't.
Q You have no cases pending against you?
A No cases pending against me.
Q And you don't get paid for it?
A No.
Q You don't get paid for your work?
A No.
Q Just only once in a while, you get some money, two or three dollars, is that correct?
A Yes.
Q You don't get paid?
A No.
Q And did any police officers give you narcotics?
A No.
Q But you get it, though, don't you?
A What?
Q Narcotics?
A If I got out on the street and buy it.
Q You get money to go out on the street and buy narcotics?
A Yes.
I had some narcotics last Wednesday. I got money from a friend of mine to buy the narcotics.
I drink sometimes too. I get the money any place I can.
Q Anyway you can. When you say anywhere I can, where do you usually get it from Officer Nance?
A What?
Q Money?

A If need be he would get a drink, yes.
Q Would he give you any money to get narcotics?
A No.
Q How much money would you say you get a week from the Narcotics Unit, on an average?
A I don't know, I don't get any money from the Narcotics Unit.
Q You mean to tell us—correct me if I am incorrect—that you—strike that.
Let me ask you this question; how many cases are there pending in which you are going to testify?
A I couldn't tell you the correct amount, but it is quite a few.
Q How much would you say, approximately?
A Oh, maybe, about 15, or so.
Q Fifteen. Are these all sales of narcotics?
A All sales.
Q Sometimes you mix them up, don't you?
A What do you mean, mix them up?
Q Well, you might be testifying against some person and mixing the facts up with somebody else?
MR. EISEN: Objection.
THE WITNESS: A Impossible.
MR. ADAM: Q It is impossible? Why do you say it is impossible?
A Because it is impossible.
Q Why is it impossible?
A Because I know about all the cases I have.
Q And you have 15, at least pending now?
A I think it is something like that.
Q And you are not getting paid for any of those transactions?
A No.
Q And you are doing this because it is your civic duty, is that right?
A That's right.
Q You are a good citizen, is that right?
A That's right.
Q You are a good citizen, is that right?
A That's right.

Q Have you ever been convicted of any crime?
A Yes, I have.
Q What crime?
A Armed robbery, possession of narcotics.
Q When was this?
A Armed robbery, 1953.
Q Under what name?
A Albert Bradley.
Q Go ahead, go on.
A And in 1957, in the month of May, I was convicted on a possession of narcotics.
Q Under what name?
A Albert Bradley.
Q What else?
A Since that time?
Q Since that time.
A I was convicted of petty theft.
Q Under what name?
A Albert Bradley.
Q Where was this?
A Where was this?
Q Where?
A What do you mean? Here.
Q In Chicago?
A Yes, all of this was in Chicago.
Q Which court?
A Which court?
Q Just tell us what court the petty theft was in?
A Judge Ryan.
Q All right. Did anybody appear with you at the time?
A What do you mean appeared with me?
Q Appear with you, go to Court with you?
A Yes, me and my wife.
Q That's all?
A That's all was there when I got my probation.
Q Didn't anybody appear with you to say you had cooperated with the police department?
A To say I had cooperated with the police department?
Q Yes.

A I don't remember.

I think I asked Officer Nance to appear with me. I think he did appear in court for me. I was convicted and got two (2) years probation.

I gave myself the name of Al Nicholes. I was just known as Al Nicholes when I signed for the money.

MR. ADAM: Q As a matter of fact, this was a name given to you by the Chicago Police Department, wasn't it?

A No, it wasn't.

Q It is not?

A No.

Q Did you ever use any other name with the Chicago Police Department?

A Did I ever use any other name?

Q Yes?

MR. EISEN: Judge, I will object to this, I don't see how it is material.

THE COURT: He may answer.

THE WITNESS: A Yes, I think I have.

MR. ADAM: Q What other names?

A I don't remember.

Q I thought you had a good memory?

A I have.

Q Then tell us what other names you used?

A I don't remember.

Q When was the last time you used any other name?

A About a year or so ago.

Q What was the first name?

A I don't remember.

My real name is Albert Bradley, it is not Al Nichols. I testified before the Grand Jury of Cook County in regard to this case. I was sworn to tell the truth. I was also under oath.

Q That's right. And were you asked this question by the State's Attorney, Mr. Spiro. "Q What is your name please? A Al Nichols."

A Yes, I was.

Q Did you give that answer?

A Yes.

Q And you knew that your name was not Al Nichols when you made the answer? It's not funny to me, is it funny to you?

A How do you know my name is not Al Nichols?

Q I am asking you. Was your name Al Nichols at that time?

A At that time my name was Al Nichols.

* * * *

Q You had three. You just testified you had another one you didn't remember.

A That was just on a case.

Q Oh, that was just on a case.

Were you asked this question and did you make this answer? "Q Is that your correct name, Al?" "A Yes, sir."

A That was my answer.

I have signed search warrants. I sign them as Al Nichols. To the best of my memory this is the only name I used in signing search warrants. I couldn't estimate how many search warrants I have signed.

Q You got on the bus and went over to Oak and Orleans, is that right?

A Yes.

Q And your guest the previous night, the defendant, paid your way on the bus, didn't he?

A I don't remember.

Q You have a good memory for that day, don't you?

A I don't remember who paid the fare on the bus.

Q You didn't have any money besides the $19, did you?

A Sure didn't.

Q And you went up to Orleans and Oak Streets with him?

A Yes.

* * * *

Q And when you were at Oak and Orleans, you got off the bus, is that right?

A At Oak and Orleans I got off the bus?

Q Yes, wasn't it, or was it Oak and Wells?

A First got off the bus at Chicago Avenue.

Q And you walked down from Chicago Avenue?

A No, we rode down Chicago Avenue to Orleans. This was on another bus. We got off the bus and walked to the drug store.

I heard the defendant talk on the telephone. The only thing I heard was "I'm here", Officer Williams just happened to be standing right by the defendant.

Q You just happened to go in there where Officer Williams happened to be?

A No, it was just a routine thing.

Q That's what I just asked you.

A No, it wasn't a coincidence.

Q Williams was in the drug store first, wasn't he?

A Yes.

Q And the defendant went in there after Williams went in there?

A That's right.

Q The Defendant went into the drug store after Williams went in there?

A Well, he was already there.

Q And the defendant happened to go up to the telephone right next to Officer Williams, where Officer Williams happened to be, is that right?

A That's right.

Q He came all the way from 18th and Wabash to this very drug store, that very phone booth right next to where Officer Williams was?

Q The phone, the telephone?

A Yes.

I don't know the number the defendant called. I knew he was going to make a phone call. The defendant had made a call the day before. I was not placed under arrest.

Q Well, were you taken into custody?

A Yes, sir, I was taken into custody, yes.

Q This was to fool the defendant, is that right?

A Yes.

Q This was a pre-arranged thing, wasn't it?

A No, it wasn't.

Q It was not pre-arranged?

A No, it was not.

Q Did you protest your arrest?
A Yes, I protested it.
Q What is the name of the person that came down the street and met the defendant?
A A stud, I don't know his last name.
Q Did you ever see him again?
A Have I ever seen him since then?
Q Yes?
A Yes, I have.
Q He's got a case pending against him now, as a result of your cooperation with the police department, isn't that right?
A No, he hasn't. The defendant was going to put a case on him.
MR. ADAM: Q And all these cases, these 15 cases, approximately, that you are going to testify in, have you used Al Nichols in all those cases?
A Yes, I have, I think I have.
Q Have you ever testified before the Grand Jury that your name was something else other than Al Nichols?
A Off hand I can't remember.
Q And this is a special employee, informer, stool pigeon, is that right?
A Yes.

OFFICER PHILLIP WILLIAMS called as a witness on behalf of the People having first being duly sworn on oath and testified as follows:

DIRECT EXAMINATION

BY MR. FLAUM:

My name is Phillip Williams. I am a police officer of the City of Chicago assign to VCD, Narcotics Division. I been so employed for about four and one half to five years.

On January 4, 1967, about 1:30 P. M. I met with a man I know to be Albert Bradley. I had a conversation with him. We searched him and found him to be free of money and narcotics. We then drove the special employee to the area of 18th and Wabash into the alley.

The special employee got out of the car and went to 57 East 18th Street. The special employee returned a short while later and my partner and I proceed to Oak and Orleans. I left the vehicle and entered a drug store and a short while later I observed the defendant and special employee inside the drug store around the telephone.

Q And what if anything happened thereafter?

A Well, at that time the defendant and the other man crossed Orleans and went to the east side of the street.

Q Did you remain in the drug store at this time?

A Yes, I did.

Q What if anything did you next observe?

A I next observed the defendant and the special employee walking south on Orleans. I left the drug store and followed them to about Chicago Avenue.

Q What if anything occurred at that time?

A As they were about to board a bus eastbound on Chicago Avenue, the special employee gave me a tinfoil package and indicated he had purchased it from the defendant. I placed the defendant under arrest at that time.

Q Now, the individual you testified to as the special employee, is that Mr. Bradley?

A Yes, it is.

Q Officer Williams, why specifically, did you go to the Rexall Drug Store on the corner, that you described?

A That was the pre-arranged spot that—

MR. ADAM: Object, Judge. This obviously going to call for hearsay and statements made outside the presence of the defendant.

THE COURT: I think it was brought up, it was suggested it being a chance meeting, and I think without going into any conversation the Offiler might explain his being there, without permitting specific conversation.

MR. EVINS: Judge, they would be doing indirectly which they couldn't do directly, if he is going to state in the record that he was there by pre-arrangement of some sort.

THE COURT: I think there was evidence to that affect already, and I think both defense attorneys have

in the questioning in the vein that this was a chance meeting. I think it was something other than that, and I think the State may point this out.

MR. ADAM: Well, Judge, my only other objection, other than those, which we have already named in this, while it might be said at sometime, although I certainly don't concede it is true, but it might be said that the defense opened the door with regard to one witness, it certainly wouldn't open it as to another witness, and we saw fit not to go into that open door, if such it were, with the other witness. And we certainly haven't done it with this witness.

MR. EISEN: I think they asked the other witness how Officer Williams happened to be in the particular drug store at that particular time. They made a big point of it and I think that it is important to this case.

THE COURT: I believe to some extent the attorney's point is well taken, but as Mr. Eisen points out, it was specifically in reference to Officer Williams, and I think that no one could better answer that than the officer himself. Therefore he may answer.

THE WITNESS: Would you repeat the question, please?

MR. FLAUM: Mr. Reporter, would you read the question, please?

(Pending question read by the reporter)

THE WITNESS: The Rexall Drug Store at Oak and Orleans, it was pre-arranged, the spot where I should go, where the informer and the special employee would be.

MR. FLAUM: Q You said the special employee and the informer. Is that what you mean, or is that the special employee and the defendant?

MR. ADAM: I object to this, Judge.

MR. EVINS: That's what he said.

MR. ADAM: Not only that, it is leading and suggestive.

THE COURT: I think he may clarify this.

The State Rests

Motion for discharge at the close of the state's case.

Argument on Motion as to point one by Mr. Adam
Answer to point one by Mr. Flaum
Rebuttal by Mr. Adam
Argument by Mr. Adam on Point II
Answer by Mr. Flaum
Rebuttal by Mr. Adam

THE COURT: I can't help but comment that both counsel have done an exceptional job in presenting the law.

In regard to point one, the Court would cite to counsel for both sides People versus Bastey, 74 Ill. App 2d. 487, September of 1966, which is a later case.

In regard to point two, I think the Russell case, as pointed out, would have been bad but for the bill of particulars, and certainly the bill of particulars under these circumstances couldn't cure the bad indictment. And as has been pointed out by counsel for both sides, the 7th Circuit does seem to indicate that the name of the purchaser is not even necessary. Therefore, I feel that the use of the bill of particulars in this case was merely to clarify, not to cure.

For these reasons the Court will deny the defendant's motion.

FOR THE DEFENSE

JOHN ADAMS, called as a witness in his own behalf, having been first duly sworn on oath, testified as follows:

DIRECT EXAMINATION

BY MR. EVINS:

My name is John Adams, I am the defendant in this indictment, 67-641.

Q Did you on January 4, 1967, sell to a person by the name of Al Nichols, a quantity of heroin as alleged and set forth in the indictment that I just described to you?

A No, sir, I did not.

Q Did you on January 4, 1967, sell to a person by the name of Albert Bradley, a quantity of heroin?

A No, sir, I did not.

Q Did you know a person by the name of Al Nichols as referred to in this indictment?

A No, sir.

I know the person that took the stand and testified here yesterday. His name is A. B. Bradley. I have known him five or six years.

I saw A. B. Bradley on January 4, 1967 about 12:00 o'clock at 57 East 18th Street in a tavern. Prior to going to the tavern he had my brother to call me. I talked to him on the phone. He told me to come on over he was spending them up, and he wanted to buy me a drink. He did not tell me he wanted to go someplace with him on the phone. When I arrived at the tavern, Mr. Bradley was sitting at the bar with several other men, couple of ladies; he was buying everybody drinks in there. I had a drink with him.

Q How long were you there?

A Approximately, about half an hour.

Q Was he in your presence the whole time you were there?

A No, sir. He got up and went to the washroom, he left his money lying on the bar. He told me to watch it until he came back, and he went in the back, to the washroom, and I sit up there and watched his money and I was drinking my beer.

Q How much money did he have on the bar?

A Oh, he had, there was bills, maybe seven or eight dollars in bills, all in bills.

A And when you left there, where did you go? Did you leave there?

A He asked me to come, to go with him to the northside. He wanted me to go with him. Him and his wife had had an argument so he had slapped her and she run off and let him.

Q Did he tell you when she had run off?

A He said that he wanted me to go on the northside with him to see if I could fine her, because I know her.

I know his wife. Her name is Charlie Mae. He asked me to go to the north side with him to look for her and I agreed to. I did not have a dollar with me. I only had

65 or 70 cents. We walked on the corner of 18th and Wabash and caught the bus going north on Wabash Avenue. We got off the bus at 12th and Wabash, transferred and went downstairs and caught the elevated, we got off the elevated at Chicago and State and went upstairs and was waiting on the northeast corner. Mr. Bradley paid the fare.

Q Take it from there and tell us what happened?

A So I went, he told me to go inside and wait and he would be right back, and he was going to check something out. So I went inside and stood inside, I think it was a drug store there, because it was cold out and he was gone about 10 minutes, 10 or 15 minutes, and he come back and then he beckoned for me to come out because the bus was coming, and we caught the bus going west.

Q You went west on the bus?

A Yes, sir.

Q And what happened when you got to Orleans and Chicago Avenue?

A We got off the bus and I asked him what direction now, so he said well, we got to go down a couple of blocks this way, so we started walking. We walked and we walked, and I said, "I'm getting cold, man, it's cold out, how far do we have to go?" He said we haven't got far, so we walked and he said "Let's go in the drug store, let's go inside, in the drug store and get warm."

Q That is what Mr. Bradley said to you?

A Yes, sir.

I saw Officer Williams in the drug store. He was about 18 or 20 feet from me over by the Counter.

Q And how long were you in the drug store?

A Oh, approximately, about 10 minutes, I was in there about 10 minutes because I told me, I said I am going to call my wife before I left because he said there was something she wanted me to do and how long would it be before I be back. I told her I didn't know. So just remember that, I said I am going to call my wife and tell her that I will be home as soon as possible. And so I made a call to her and she asked where was I at and I told her I am on the northside overhere, looking—

Q You made a telephone call?
A Yes, sir.
Q And you told your wife you were A. B. over on the northside?
A Yes, sir.
Q And what happened after that?
A Then I hung the phone up and I was looking out the window, some distance from the window, and I saw a friend of mine that I know and I told A. B., I said, "I am going out there. There's Charlie across the street." I said, "I'm going over there to see if he seen your wife," because he knows his wife, too.
Q Charlie knows Charlie Mae?
A Yes.
Q And that's Mr. Bradley's wife?
A Yes, sir.
Q And did you see Charlie?
A Yes, sir.
Q And did you have a conversation with Charlie?
A Yes, sir, I went over and talked to him and asked him had he saw Charlie Mae. He asked me what was I doing over there and I told him I come over with A. B., looking for his wife, had he seen her. He said, "Well, has she done and run off and left him again?" I said yes. He said, "Well, I haven't seen her." That was the conversation.
Q Was that all you said?
A Yes, sir.
Q And now, at that time did you give Charlie any money?
A No, sir.
Q Did Charlie give you any money?
A No, sir.
Q Then after you—Bradley knows Charlie, too, doesn't he?
A Yes.
Q After you had this conversation what did you do then?
A I came back, started back to the drug store where he was and he came out and he told me, he said—
Q Did you beckon for him to come out?

A No, sir, he came out himself, and met me and so he told me, he said, "Well, I think we'd better go on back on the south side." He said, "Maybe she might come back, if not we can come on back here later on tonight."

Q And then what happened after that?

A We started back to catch the bus.

Q And then what happened?

A We got up to Chicago Avenue and we were standing there waiting to take the bus and he said he had to go to a latrine and I told him, I said, "You can't go here." So he said, "Well, I don't care where I do it." I said, there's a gas station across the street, go over there and you use the latrine, "so he went in the gas station to go to the latrine, to use the bathroom. I was standing on the corner, waiting, and when he came back we boarded the bus, and he was waiting to pay the fare and that's when I was arrested, I was pulled off the bus by Officer Williams.

Q And was he also taken off the bus?

A Yes, sir.

Q And when you were taken off the bus by Officer Williams did he tell you what he was taking you off the bus for?

A No, sir. He said I looked suspicious, I was over here trying to steal something.

Q Did you tell Officer Williams at that time that you had gone over there with Mr. Bradley to look for his wife?

A Yes, sir, I did.

Q You told him that?

A Yes, sir.

Q And then what did Officer Williams do then?

A He carried me over to the gas station and searched me.

Q And did he take Bradley, also?

A Yes, sir, taken both of us.

Q Did he search him too?

A Yes, sir, he searched him.

We were taken and put into another car with Officer Nance and transported to 11th and State. The Officers

later told me that I was under arrest for the sale of narcotics. I told them why I went to the northside.

Q Well, how much money did you have on you when you were arrested?

A 60 cents, I think, I had 60 cents.

Q You had the same amount you had on when you left the southside.

A All except a dime.

Q And what did you do with the dime?

A To make a phone call to my wife.

I did not give People's Exhibit 1-D to Al Nichols on January 4, 1967. I did not give People's Exhibit 1-D to Albert Bradley on January 4, 1967. I did not have People's Exhibit 1-D in my possession. Today is the first time I saw People's Exhibit 1-D.

CROSS EXAMINATION

BY MR. FLAUM:

I first met Mr. Bradley at about 12:00 or 12:30 at 57 Club. He was there.

Q Fine. Thank you. Mr. Adams, you testified that you have known Mr. Bradley for sometime, is that correct?

A Correct.

Q Could you estimate about how long that was?

A Five or six years.

Q Had you met him previously at that tavern?

A Every day.

Q Do you know most of his friends?

A Yes, sir, I know quite a few of his friends.

Q And now, did you testify that when you arrived at the tavern he was, he being Mr. Bradley, was buying drinks for some people who had been nice to him, or kind to him?

A Yes, sir, he was.

Q And were they his friends?

A Yes, sir, I imagine they were, they said they were.

* * * *

MR. FLAUM: Q Could you give us the names of some of the people who were in the tavern at that time, drinking?

A Yes, sir, there was a boy named Russell and a boy named Oatis; and there was a girl named Emma, and there as—let's see who else. My brother, he was in there.

Q And now, you said you received a call from Mr. Bradley that day, is that correct?

A Yes, sir.

I work at the 57 Club. I am the porter at night.

Q How far away was he—strike that.

How close is the closet Officer Williams was to you at any one time when you were in the drug store together with the officer?

A As I remember, when him and I was in the drug store, we was standing up near the front. We was only going in there to get warm, so he said. I remember seeing Officer Williams standing over there, over there by the front. We stood up there and I remember him walking over to him and pushing him and he said, "Pardon me."

Q Who pushed who?

A A. B.

Q Pushed Officer Williams?

A He said, "Pardon me." And he stood over by the counter, and he went over by the counter.

The Defense Rests

ALBERT BRADLEY called as a witness on behalf of the State, having been previously duly sworn, resumed the stand and testified further in rebuttal as follows:

DIRECT EXAMINATION

BY MR. EISEN:

My name is Albert Bradley. I am also known as Al Nichols. I testified previously in this case. I was in the 57 Club on January 4, 1967. I left there about 2:00 something.

MR. ADAM: No, I just asked him if he drank today.

Q Have you been paid for this testimony here today, since yesterday?

A No, sir.

Q You expect a little bit, though, don't you?

MR. FLAUM: Object, your Honor.

THE WITNESS: No, sir.

MR. ADAM: Was there a ruling on that, Judge?

THE COURT: I believe he responded.

MR. ADAM: Q The answer is no, you haven't been paid and you don't expect to be paid, is that right?

A That's right.

Q Just never mind that. Was the defendant in the tavern when you went to the car, or wasn't he?

A No, he was not.

Q All right. Then you came back to the tavern, right?

A Yes, sir.

Q Then you left again?

A Me and the defendant, yes.

* * * *

MR. ADAMS: Q You were high in wine at the time weren't you?

A No, I wasn't.

Q You had been drinking wine?

A Yes, I had.

Q And you had some narcotics that day, hadn't you?

A No, I hadn't.

MR. EISEN: The State will now call Officer Williams back to the stand.

MR. ADAM: We will object to Officer Williams testifying. He has been in Court all this time conferring with the State's Attorney.

MR. FLAUM: We will object to the speech, your Honor. Officer Williams has been in Court and he hasn't conferred with the State's Attorney on this case.

MR. ADAM: I don't know what he was conferring about, but he has been conferring with the State's Attorney and we object to recalling him.

MR. FLAUM: We are entitled to have an officer present during the course of the trial.

THE COURT: He may be called in rebuttal.

PHILLIP WILLIAMS, having been previously called as a witness on behalf of the People, having been previously sworn, resumed the stand and testified further in rebuttal as follows:

DIRECT EXAMINATION

BY MR. EISEN:

My name is Phillip Williams. I previously testified in this case.

Q And when the defendant and the informant arrived, in what area of the drug store were you in?

A I was in the, about the center of the drug store when I observed the informer and the defendant.

* * * *

Q And how close were you to him when he did that?

A The first time I was still about the center of the tavern—I mean the drug store. I would say approximately as far as from here to Mr. Adams, which I would estimate to be 15 or 17 feet. The second time the defendant made a phone call I was standing directly next to him at the next telephone.

The State Rests in Rebuttal
The Defense Rests in Rebuttal
Motion for a finding of not guilty at the cost of all the evidence.

THE COURT: The Motion will be denied.

Argument by the State
Argument by the Defense
Argument by the State in Rebuttal
Finding of Guilty
Motion for a New Trial denied
Motion in Arrest of Judgment denied
Hearing in Aggravation and Mitigation

MR. FLAUM: Your Honor, for the purpose of aggravation, may the record reflect that in 1956 the defendant, John Adams, received a sentence of two years and two years and one day in the Illinois State Peniten-

tiary upon a conviction for the sale of narcotics. In 1960 the defendant received six months—

MR. EVINS: Object to that, this is not proveable.

MR. FLAUM: Well, your Honor this is just by way of aggravation. We are not offering it for any other purpose.

THE COURT: This is true, any conviction, I think, Mr. Evins, would be proper, if that is what it is.

MR. FLAUM: Your Honor, there was a conviction for possession of a hypodermic needle and he received six months.

THE COURT: When was this?

MR. FLAUM: In 1960, your Honor. The defendant received 11 months in the County Jail in 1963 on a charge of theft. In February, 1965, he received—

MR. EVINS: Let the record show I am objecting to the reading of all these things in the record.

THE COURT: These are convictions? I don't believe he is reading any arrests.

MR. FLAUM: In February, 1967, your Honor—

MR. EVINS: My objection, I take it, is overruled, Judge?

THE COURT: Yes, that's correct.

MR. FLAUM: In February, 1965, two years probation, first 30 days in the House of Correction on a charge of theft.

Your Honor, based upon the nature of the offense here, the recommendation of the State would be 10 to 20 years in the Illinois State Penitentiary.

THE COURT: The Court sentences the Defendant, MR. ADAMS, to a term in the penitentiary from 10 to 13 years.

Defendant advised of his right to appeal.
Order of Court appointing same for purpose of appeal.
Certificate of Official Court Reporters
Seal of Clerk of Court

(No. 41446.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

vs.

JOHN ADAMS, APPELLANT

Opinion filed September 29, 1970.

1. CRIMINAL LAW—*when misnomer in indictment charging unlawful sale of narcotics is not fatal.* Although the indictment charging defendant with an unlawful sale of narcotics named the purchaser incorrectly, the misnomer was not fatal, where defendant, by way of a bill of particulars, became aware of the purchaser's true identity prior to trial, for section 3 of the Uniform Narcotic Drug Act does not make the purchaser's identity an element of the offense, and the court will not find a fatal variance between the indictment and proof where it is not shown that the jury was misled or that substantial harm was brought upon the defendant. (p. 203)

2. SAME—*preliminary hearing is "critical stage" of criminal process.* Although a preliminary hearing, which is designed to designed to determine if there is probable cause to believe an offense has been committed by defendant is not a necessary step in a criminal prosecution, a preliminary hearing has been held by the United States Supreme Court to be a "critical stage" in the proceedings. (*People* v. *Bonner*, 37 Ill.2d 553, and *People* v. *Morris*, 30 Ill.2d 406, overruled in part.) (p. 205)

3. SAME—*rule requiring counsel at preliminary hearing has only prospective application.* Defendant, on review of a narcotics conviction, cannot complain that his constitutional right to counsel was denied by the court's failure to appoint counsel at his preliminary hearing, despite his failure to request counsel at the time, for the recent rule of *Coleman* v. *Alabama*, 399 U.S. 1, 26 L.Ed. 2d 387, requiring counsel on the ground that a preliminary hearing is a "critical stage" of the proceedings, is not to be given retroactive application. (p. 206)

4. SAME—*when evidence supports narcotics conviction.* Where evidence shows a controlled sale of narcotics by an informant acting in cooperation with two police officers, and circumstantial evidence and testimony, if believed, was sufficient to demonstrate defendant's guilt of the unlawful sale of narcotics, the reviewing court will find the conviction supported by sufficient evidence, although the officers neither viewed the transfer nor recovered the marked currency used. (p. 208).

APPEAL from the Circuit Court of Cook County; the Hor JACQUES F. HEILINGOETTER, Judge, presiding.

SAM ADAM, EDWARD M. GENSON, and CHARLES B. EVANS, all of Chicago, for appellant.

WILLIAM J. SCOTT, Attorney General, of Springfield, and EDWARD V. HANRAHAN, State's Attorney, of Chicago, (JAMES B. ZAGEL, Assistant Attorney General, and ELMER C. KISSANE, and THOMAS HOLUM, Assistant State's Attorneys, of counsel,) for the People.

Mr. JUSTICE WARD delivered the opinion of the court:

Following a bench trial in the circuit court of Cook County, the defendant, John Adams, was found guilty of the unlawful sale of a narcotic drug and was sentenced to a term of from 10 to 13 years in the penitentiary. On appeal he claims that the judgment of conviction must be set aside because (1) he was deprived of his constitutional right to be advised of the nature of the accusation against him, (2) he was denied his constitutionally assured right to counsel at the preliminary hearing, and (3) the evidence was insufficient as a matter of law to support the finding of guilty. The constitutional questions presented give this court jurisdiction on direct appeal. Ill. Rev. Stat. 1969, ch. 110A, par. 603.

The relevant portion of the indictment charged the defendant with the sale of the narcotic drug heroin "in that he knowingly sold to Al Nichols." At trial evidence disclosed that the true name of the alleged purchaser was Albert Bradley, but that he was also known as Al Nichols. The record further shows that the defendant was aware of the true name of the purchaser prior to trial, this having been made known to the defendant by

the State in response to his motion for bill of particulars. It is not disputed that the evidence showed that the "Al Nichols" named in the indictment and the Albert Bradley who testified at the trial are the same person.

The defendant contends that the intentional misnomer which appeared in the indictment deprived him of his constitutional right to be informed of the nature of the accusation against him. A defect of this character in an indictment, it is charged, prevents an accused from intelligently pleading to the charge, interferes with the effective preparation of a defense, and precludes a defendant from raising a conviction or acquittal as a plea in bar to a subsequent prosecution for the same offense. The defendant argues that in order to satisfy the constitutional requirements, an indictment for the unlawful sale of narcotics must accurately set forth the true and correct name of the alleged purchaser.

Section 9 of article II of the constitution of Illinois provides, in part, that "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of the accusation * * *." This constitutional assurance has been interpreted to mean that the offense charged must be sufficiently set forth so that the accused will be able properly to prepare his defense and raise the judgment as a plea in bar to a subsequent prosecution for the same offense. *People* v. *Griffin*, 36 Ill.2d 430; *People* v. *Beeftink*, 21 Ill.2d 282.

We consider that it is not necessary that an indictment for the sale of a narcotic drug name the purchaser in order to satisfy this constitutional requirement. Section 3 of the Uniform Narcotic Drug Act (Ill. Rev. Stat. 1969, ch. 38, par. 22—3) declares it to be "unlawful for any person to * * * possess * * * sell * * * any narcotic drug, except as authorized in this Act." The statute creating the offense makes no reference to the purchaser of the drug and his identity is not an element of the crime. The gravamen of the offense is the unlawful sale itself. Many Federal courts considering the sufficiency of indictments returned under a Federal statute which resembles ours have also concluded that the purchaser of the drug need not be named in the indictment. The Federal statute makes it unlawful for any person "to sell,

barter, exchange, or give away narcotic drugs" except under specified exceptions and circumstances. (26 U.S.C., sec. 4705(a).) In *Clay* v. *United States* (10th cir. 1963), 326 F.2d 196, 199, the court, affirming a conviction based on an indictment which did not include the name of the purchaser, stated: "The statute makes no provision or requirement with respect to the identity of the person to whom the illegal sale is made and we must therefore conclude * * * that the identity of the purchaser is not an element of the offense." Too, in *Collins* v. *Markley* (7th cir. 1965), 346 F.2d 230, it was held that the purchaser need not be named in an indictment under that statute. See also, *Aggers* v. *United States* (8th cir. 1966), 366 F.2d 744; *United States* v. *Jackson* (3rd cir. 1965), 344 F.2d 158; *Sanchez* v. *United States* (1st cir. 1965), 341 F.2d 379, *cert. den.* 381 U.S. 940.

The question remaining here is the effect of the indictment's incorrectly naming the purchaser in the indictment. This court has held in *People* v. *Figgers*, 23 Ill.2d 516, 519, that where an indictment charges the elements essential to an offense under the statute, other matters unnecessarily appearing in the indictment may be rejected as surplusage. (*Cf. People* v. *Peppas*, 24 Ill.2d 483.) Thus, as the naming of the person to whom the illegal sale was made was not essential to the sufficiency of the indictment in question, the misnomer may be regarded as surplusage. A question evolving from this is whether the variance between the allegations in the indictment and the evidence presented was fatal so as to invalidate the conviction. This court has held that no fatal variance will be found where from the record there is no question as to the identity of the person named in the indictment. (*People* v. *Jankowski*, 391 Ill. 298, 302.) Too, variances as to names will not be regarded as material unless it appears that the jury was misled or that substantial harm was thereby brought upon the defendant. (*People* v. *Allen*, 17 Ill.2d 55, 58.) Here, the record shows unmistakeably that it was disclosed in the trial that "Al Nichols" and Albert Bradley were the same person. No prejudice was incurred by the defendant as he was aware of this prior to trial. The defendant's pro-

tection against double jeopardy is assured because identification can be established by the use of the record or parol testimony or both. *People* v. *Jankowski*, 391 Ill. 298; *People* v. *Petropoulos*, 59 Ill. App. 2d 298, affirmed 34 Ill.2d 179; *cf. Russell* v. *United States*, 369 U.S. 749, 8 L. Ed. 2d 240, 82 S. Ct. 1038.

Parenthetically, we would observe that while, of course, a void indictment cannot be validated by a bill of particulars (*People* v. *Blanchett*, 33 Ill.2d 527; *People* v. *Flynn*, 375 Ill. 366; *Russell* v. *United States*, 369 U.S. 749, 8 L. Ed. 2d 240, 82 S. Ct. 1038), a defendant accused by an indictment legally adequate in detail may seek a bill for greater detail of the charge against him "so as to enable the accused to better understand the nature of the charge against him or better prepare his defense." *People* v. *Patrick*, 38 Ill.2d 255, 260; see, *Scott* v. *United States* (3rd cir. 1965), 342 F.2d 813.

Next the defendant argues that he was erroneously denied his constitutional right to have counsel appointed for him at the preliminary hearing. No request for the appointment of counsel was made at the time of the hearing, but we have held that if the right to counsel exists by virtue of the critical nature of the proceedings an accused is entitled to representation even though there has not been a specific request on his part for counsel. (*People* v. *Bonner*, 37 Ill.2d 553, 561.) We have held that a preliminary hearing does not constitute a "critical stage" in the criminal prosecution so as to give rise to a constitutional right to representation. (*People* v. *Bonner*, 37 Ill.2d 553; *People* v. *Morris*, 30 Ill.2d 406.) In *Bonner* and *Morris* the preliminary hearings were characterized as proceedings to ascertain whether a crime had been committed, and to determine whether there was probable cause to believe that the accused had committed the crime. However, the United States Supreme Court recently held that the preliminary hearing proceeding in Alabama was a "critical stage" in that State's criminal process requiring the presence of counsel. *Coleman* v. *Alabama*, 399 U.S. 1, 26 L. Ed. 2d 387, 90 S. Ct. 1999, 38 U.S.L.W. 4535.

A preliminary hearing in Alabama, as in Illinois, has the purpose of determining whether there is probable cause to believe an offense has been committed by the defendant (Code of Alabama, Tit. 15, secs. 139, 140, 151; Ill. Rev. Stat. 1969, ch. 38, par. 109—3). In both States the hearing is not a required step in the process of prosecution, as the prosecutor may seek an indictment directly from the grand jury, thereby eliminating the proceeding. (*Ex Parte Campbell*, 278 Ala. 114; 176 S. 2d 242; Ill. Rev. Stat. 1969, ch. 38, par. 111—2.) In neither State is a defendant required to offer defenses at the hearing at the risk of being precluded from raising them at the trial itself (*Alabama* v. *Coleman*, 44 Ala. App. 429, 433, 211 So. 2d 917, 921; *People* v. *Bonner*, 37 Ill.2d 553, 560). We conclude that the preliminary hearing procedures of Alabama and Illinois are substantially alike and we must consider because of *Coleman* v. *Alabama*, 38 U.S.L.W. 4535, that a preliminary hearing conducted pursuant to section 109—3 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 109—3) is a "critical stage" in this State's criminal process so as to entitle the accused to the assistance of counsel.

The pivotal consideration in the remaining question of whether the direction of *Coleman* is to be applied to the present case is whether *Coleman* is to be given retroactive effect or is to be applied prospectively only. On this question of retroactive or prospective application the United States Supreme Court said in *Stovall* v. *Denno*, 388 U.S. 293, 297, 18 L. Ed. 2d 1199, 1203, 87 S. Ct. 1967: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

The Supreme Court's purpose in requiring representation by counsel at the preliminary hearing was obviously to provide greater protection for the rights of an accused. The court in *Coleman* discussed considerations which would serve this purpose: "First, the lawyer's skilled examination and cross-examination of witnesses

may expose fatal weaknesses in the State's case, that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Coleman* v. *Alabama*, 26 L. Ed. 2d at 397, 38 U.S.L.W. 4535, 4537-4538.

The right to counsel at trial (*Gideon* v. *Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792), and on appeal (*Douglas* v. *California*, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814), and at some forms of arraignment (*Hamilton* v. *Alabama*, 368 U.S. 52, 7 L. Ed. 114, 82 S. Ct. 157) have been made retroactive because the Supreme Court considered that at these stages in the criminal process the absence of counsel "almost invariably" results in the denial of a fair trial. (See *Arsenault* v. *Massachusetts*, 393 U.S. 5, 21 L. Ed. 2d 5, 89 S. Ct. 35.) However, in *Stovall* the court observed: "The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities'. [Citation.] Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall* v. *Denno*, 388 U.S. 293, 298, 18 L. Ed. 2d 1199, 1204.

On this scale of probabilities, we judge that the lack of counsel at a preliminary hearing involves less danger to "the integrity of the truth-determining process at trial" than the omission of counsel at the trial itself or on appeal. Such danger is not ordinarily greater, we consider, at a preliminary hearing at which the accused is unrepresented than at a pretrial line-up or at an in-

terrogation conducted without presence of an attorney. The constitutional right to counsel at these two stages was denied retroactive application by the Supreme Court. *Stovall* v. *Denno*, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967; *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772.

Against this background, we regard, too, the prior reliance of law enforcement authorities upon former holdings that counsel was not required at preliminary hearings and the effect of a retrospective application of the new requirement. (*Cf. Jenkins* v. *Delaware*, 395 U.S. 213, 23 L. Ed. 2d 253, 89 S. Ct. 1677.) Most Federal and State courts that considered the question ruled that a preliminary hearing, which had for its primary purpose the determination of probable cause and at which the accused was not required to enter a plea, waive any defenses or otherwise prejudice himself, was not a "critical stage" requiring the appointment of counsel. (See Annot., 5 A.L.R.2d 1269, 1314-1342 and cases cited.) It is clear there has been understandable reliance on these ruling by law enforcement officials and the courts. It is clear, too, that a retroactive application of *Coleman* would obviously have a far reaching and grievous effect on the administration of justice. Thousands of cases without doubt would have to be reconsidered in light of the new requirement. The impact of this on already congested criminal dockets and now overburdened courts would be increased by the evident difficulties of applying the harmless error doctrine (*Chapman* v. *California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824,) to many of the cases to be reconsidered, as the Supreme Court directed to be done in *Coleman*. We conclude from these considerations that *Coleman* should not be given retroactive application.

The final point raised by the defendant is that the evidence was insufficient to establish guilt beyond a reasonable doubt. We consider that because of the circumstances of the case any detailed summary of evidence would be lengthy and really unnecessary. The evidence presented showed a controlled sale of narcotics by an informant acting in cooperation with two police officers.

Circumstantial evidence and testimony, if believed, certainly demonstrated the defendant's guilt. It was the function of the trial court as the trier of fact to evaluate the credibility of the witnesses and its "finding of guilty will be disturbed only where the evidence is so unreasonable, improbable or unsatisfactory as to leave a reasonable doubt as to the defendant's guilt." (*People* v. *Scott*, 38 Ill.2d 302, 306.) A review of the evidence discloses no cause to disturb the finding of the trial judge. In *People* v. *Realmo*, 28 Ill.2d 510, this court affirmed a trial court's finding of guilty under circumstances resembling those here. There one or more officers, although not viewing the transfer of either the narcotics or the marked currency, as here, observed a significant part of the defendant's activity is making a controlled sale of narcotics, and corroborated an informer's testimony in this respect. In *Realmo*, too, none of the prerecorded money was recovered by the police.

For the reasons given, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Respectfully submitted,

SAM ADAM and
CHARLES B. EVINS
Attorneys for Appellant's

SUPREME COURT OF THE UNITED STATES

No. 6048, October Term, 1970

JOHN ADAMS, PETITIONER

v.

ILLINOIS

On petition for writ of Certiorari to the Supreme Court of the State of Illinois.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to question 2 as set forth in the petition which reads as follows:

"2. Whether Coleman v. Alabama, 399 U.S. 1 (1970) is retroactive and/or applicable to a cause where, prior to trial, the defendant objected to the failure to provide counsel at the preliminary hearing?"

March 8, 1971

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 438267 15

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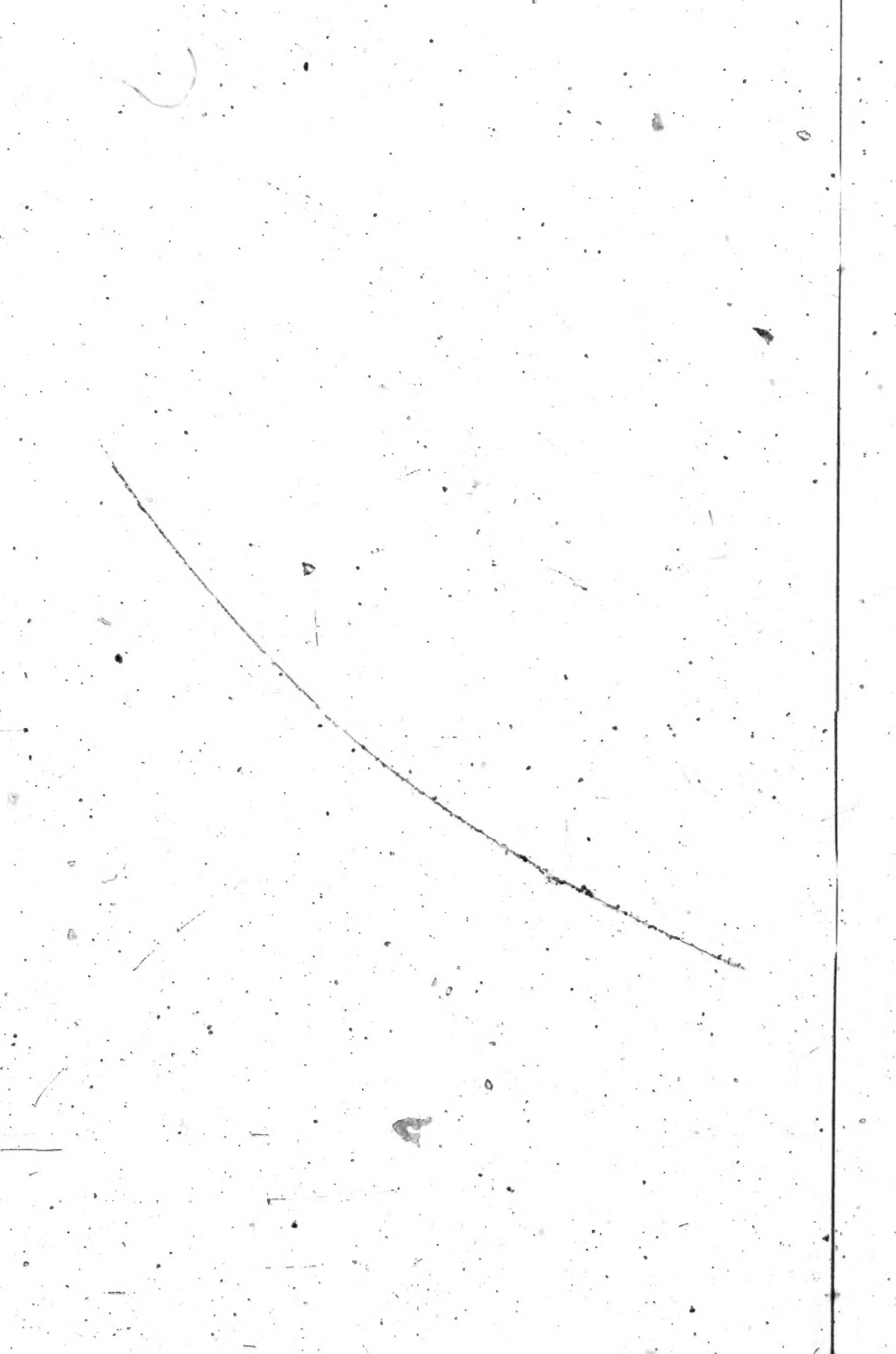

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6048

JOHN ADAMS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Writ of Certiorari To The Supreme Court of Illinois)

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether *Coleman* v. *Alabama*, 399 U.S. 1 (1970), should be applied retrospectively, and if so, whether it is applicable to a case where the defendant, while represented by privately retained counsel, moved prior to trial to dismiss the indictment for failure of the court to offer him appointed counsel at the preliminary hearing.

STATEMENT OF THE CASE

The petitioner, John Adams, was arrested by Officer Phillip Williams of the Chicago Police Department on January 4, 1967, for engaging in the unlawful sale of narcotics, namely heroin. A preliminary hearing was had on February 10, 1967, and Adams was bound over to the Cook County Grand Jury. An indictment was subsequently returned (R. 3, 4), and Adams' trial commenced before the Honorable Jaques F. Heilingoetter of the Circuit Court of Cook County on May 2, 1967, a jury having been waived (R. 15).

Evidence At Trial And Sentencing

The first witness called by the prosecution was Officer Willis Nance of the Chicago Police Department. He testified that on January 4, 1967, he and Officer Williams met with one Albert Bradley at 1121 South State Street, at approximately 1:30 P.M. Bradley was searched and found to be free of money and narcotics (R. 66). He was given $19 in prerecorded funds, and then driven by Officers Nance and Williams to 18th and Wabash in Chicago where Bradley entered a tavern (R. 66). Bradley returned to the vehicle five minutes later and had a conversation with the officers (R. 67). He left again, and moments later, Officer Nance saw Bradley leave the tavern with the Petitioner, John Adams, and board a bus (R. 68). Both police officers then proceeded to Orleans and Oak Streets in Chicago in accordance with prearranged plans (R. 68-69). When they arrived some 15 or 20 minutes later (R. 88), they saw Adams and Bradley near a drug store at Orleans and Oak streets. The officers had arrived at Orleans and Oak before Bradley and Adams

(R. 87). Officer Nance remained in the squad car and Officer Williams left the car and went into the drug store (R. 69). Officer Williams entered the drug store perhaps a minute before Adams and Bradley entered (R. 91). Officer Nance saw Adams come out of the drug store and walk around the block completely. When he returned to where he had started from, another male Negro appeared on the corner with him (R. 91). The two men crossed the street and started walking south on the east side of the street (R. 71). Officer Nance next saw Adams 15 minutes later after he had been arrested (R. 71-72). Adams was searched, and no marked money or narcotics was found on his person (R. 97).

Albert Bradley next took the stand and testified that his real name was Albert Bradley but that he was also known as Al Nichols (R. 113). He testified that at 1:30 P.M., on January 4, 1967, he went to 1121 South State Street and saw Officers Nance and Williams. They had a conversation, he was searched and found to be free of money and narcotics (R. 114), and he was given $19 in recorded funds (R. 115). They then drove to 18th and Wabash and he entered a tavern called the 57 Club. He contacted the petitioner, Adams, whom he knew only as John Earl, by telephone; Adams' brother placed the call for him (R. 116). On the telephone, Bradley told Adams he wanted to "cop," and Adams said he would be right down (R. 117). Bradley then went back to the parking lot, where Officers Nance and Williams were parked, and told them what he was going to do (R. 118). He then went back to the tavern to wait (R. 119). Adams arrived in 15 minutes (R. 119); Bradley gave him the marked money, and they left the tavern and boarded a bus going to Chicago Avenue (R. 121). At Chicago Ave-

nue, they transfered over to Orleans, and then walked down Orleans to Oak Street and entered a Rexall Drug Store (R. 121). Adams had never left his presence (R. 121). Officer Williams was already in the drug store when they arrived, and he was standing about a foot away from Bradley and Adams (R. 122) at an open telephone booth (R. 124). Adams made another telephone call and said "I'm here," that's all (R. 122-123). Adams then went outside and met with another man (R. 124). They crossed the street, and then Adams beckoned to Bradley (R. 124). Bradley went across the street and received a small tinfoil package (R. 125-127). Adams and Bradley then walked to Chicago Avenue and Orleans, where they were arrested by Officer Williams as they were boarding a bus (R. 125).

On cross-examination, Bradley admitted he was a professional informer (R. 151). He said that it was not a coincidence that he and Adams had gone to that particular Rexall Drug Store; that it was a routine thing (R. 171-172). He knew that Adams was going to make a call from that particular place because he had done it the day before, and Bradley had told Officer Williams this when they were parked at 18th and Wabash (R. 172-173).

Officer Williams then testified for the State. His testimony corroborated that of Albert Bradley and Officer Nance. He said that he and Officer Nance had gone to the Rexall Drugs because it was prearranged that this would be where the informer and defendant would come (R. 188). He testified that he was in the center of the Rexall Drug Store when Adams and Bradley arrived, and that he was standing right next to Adams when Adams made the second telephone call (R. 296). He said that

after Bradley and the defendant left the drug store they started walking south on Orleans Street (R. 178). As they were about to board a bus eastbound on Chicago Avenue, Bradley gave Williams a tinfoil package and indicated he had purchased it from Adams. Williams then placed Adams under arrest (R. 179). A small tinfoil package was then marked People's Exhibit 1-D, and Officer Williams identified it as the one he received from Bradley. It bore Williams' initials (R. 182). It was stipulated that the contents of this package had been tested by a police chemist and found to be heroin (R. 183). It was also stipulated that Adams was 36 years old (R. 189).

Adams then took the stand on his own behalf and denied the charge (R. 241). He testified that he saw Albert Bradley at 12:00 noon on January 4, 1967, at the 57 Club at 18th and Halsted (R. 243). He said that Bradley had called him and told him to come over, that he was "spending up" his money and wanted to buy Adams a drink (R. 243-244). Adams' brother had placed the call for Bradley (R. 267). Bradley then asked Adams to go to the north side with him to find his wife who had left Bradley after an argument (R. 246). Adams did not know why Bradley wanted to look for his wife on the north side (R. 268). He had nothing to do, so he went (R. 246). They took a bus to Chicago Avenue, where Bradley left Adams in a drug store so Bradley could go and "check something out." (R. 249). Bradley was gone 10 to 15 minutes. Bradley did not say where he was going, or that he was looking for his wife and Adams never asked him where he went (R. 271). When they reached Orleans and Oak, Adams said he was cold, and Bradley suggested that they go into the Rexall Drug Store and get warm (R. 250). They were in the store for

10 minutes. Adams called his wife and told her where he was and that he would be home soon (R. 275). Adams was looking out the drug store window when he saw a friend of his named Charlie, who also knew Bradley's wife (R. 253). He went out and talked with Charlie, but he had not seen Bradley's wife either (R. 253). Bradley did not leave the drug store to ask Charlie about his wife (R. 272). Bradley then came out and suggested that they return to the south side (R. 254). Bradley went to a nearby gas station to use the washroom, and when he returned they boarded a bus, but were immediately arrested by Officer Williams (R. 255). Officer Williams told him he looked suspicious and was over here trying to steal something (R. 255). Adams told the arresting police officers that he was on the north side to help Bradley look for his wife (R. 256-257).

The prosecuting attorney then offered into evidence People's Exhibit No. 3, which was proof of the defendant's prior conviction for unlawful sale of narcotics (R. 277).

Albert Bradley was again called by the State in rebuttal. He testified that, contrary to what Adams said, he was not present at the 57 Club between 12:00 and 1:00 P.M. on January 4, 1967, and that he was not buying drinks for everyone at the tavern (R. 280). They left the 57 Club at 2:00 P.M., and Adams never left his presence until Adams went out to meet his contact at Orleans and Oak (R. 281). He never told Adams about any quarrel with his wife. He testified that he had been in that Rexall Drug Store with Adams twice before that occasion, the last time being on January 3, 1967, the day before Adams' arrest (R. 282). Adams never said anything about calling his wife, but merely placed the call

and said, "I'm here." (R. 283). Further, Bradley testified that he never went into a gas station when he and Adams were heading back to the south side (R. 283).

Officer Phillip Williams was called again by the State in rebuttal (R. 295). He testified that when the third party arrived at the area of the corner outside the Rexall Drug Store, he heard Adams say, "There he is." (R. 297). He testified that he did not tell Adams that he was under arrest because he was suspicious looking and might be committing a theft, but told him he "had a sale on him." (R. 297). He testified that he never saw Albert Bradley go into the gas station without Adams (R. 297). He testified that he did not recall Adams saying, when placed under arrest, that he was on the north side looking for Albert Bradley's wife (R. 298).

After final argument by counsel, the court entered a finding of guilty (R. 313). The hearing in aggravation and mitigation disclosed that Adams had previously been convicted of unlawful sale of narcotics (1956), unlawful possession of a hypodermic needle (1960), and two separate offenses of theft (1963, 1965). (R. 314, 315). The court sentenced the defendant to a term of 10 to 13 years in the Illinois State Penitentiary (R. 316).

Pre-Trial Motions

Prior to trial, Petitioner's trial counsel moved to dismiss the indictment against Adams on the ground that the presiding judge at the preliminary hearing failed to appoint counsel to represent Adams during those proceedings (R. 11I-11J). During oral argument on this motion before the trial judge, the prosecution argued that a preliminary hearing was not a critical stage of an Illinois criminal proceeding and thus the appointment

of counsel was not required, relying on the case of *People* v. *Morris,* 30 Ill. 2d 406, 197 N.E. 2d 433 (1964). (R. 43). The trial court agreed, and the motion to dismiss the indictment was denied. (R. 12, 49).

Petitioner's trial counsel also moved prior to trial for a Bill of Particulars (R. 40). In response, the prosecution immediately informed defense counsel that the offense occurred at approximately 2:30 to 3:00 P.M. on January 4, 1967, in the area of Orleans and Clark Streets in Chicago and that the informer's true name was Albert Bradley (R. 41). Thereupon, defense counsel waived the written Bill of Particulars (R. 42-43). This exchange of information occurred on April 28, 1967, four days prior to trial. On that same day, the prosecution made the informer-purchaser, Bradley, available to defense counsel. Further, on that same day the defense answered "ready for trial" (R. 39, 50). At no time did defense counsel request a continuance to investigate further the informer's identity or to prepare more adequately his defense.

Appeal To The Illinois Supreme Court

On appeal to the Supreme Court of Illinois, petitioner raised three issues for consideration. He first argued that the informer-purchaser, Albert Bradley, was intentionally misnamed in the indictment thus depriving him of his right to be informed of the nature of the charge against him. Relying on the cases of *People* v. *Zito,* 237 Ill. 434 (1908), and *Collins* v. *Markley,* 346 F. 2d 230 (7th Cir. 1965) (*enbanc*), the State argued that the illegal sale of narcotics is a "victimless" crime as distinguished from crimes with specific victims such as murder, robbery or rape. As such, the name of the purchaser of the nar-

cotics is not an element of the crime under Illinois law, and thus the failure to name, or to misname, the purchaser does not result in a technical insufficiency in the indictment.

Petitioner also argued that it was error for the judge at the preliminary hearing not to offer him appointed counsel. In response, the State, relying on *People* v. *Bonner,* 37 Ill. 2d 553, 229 N.E. 2d 527 (1967), *cert. denied* 392 U.S. 910 (1968), and *People* v. *Morris,* 30 Ill. 2d 406, 197 N.E. 2d 433 (1964), again argued that a preliminary hearing in Illinois did not constitute a critical stage of a criminal proceeding and thus the failure to offer appointed counsel was not error. It, of course, must be noted that this Court's decision in *Coleman* v. *Alabama,* 399 U.S. 1 (1970), had not yet been rendered at the time of the filing of the State's brief. However, by the time the Supreme Court of Illinois rendered its decision in the instant case, *Coleman* had been decided and the Supreme Court of Illinois specifically held that *Coleman* did not require retroactive application.

Finally, petitioner argued that his guilt was not proved beyond a reasonable doubt. In response, the State argued that the evidence adduced at trial clearly proved Petitioner guilty of the illegal sale of narcotics beyond all reasonable doubt. Not only did the informer, Bradley, testify to all the events constituting the unlawful sale, but his testimony was corroborated in all material respects by the two police officers. The testimony of these three witnesses was contradicted only by the uncorroborated story of the petitioner that Bradley had asked him to help look for his runaway wife.

After hearing oral argument, the Supreme Court of Illinois affirmed petitioner's conviction. *People* v. *Adams,*

46 Ill. 2d 200, 263 N.E. 2d 490 (1970). From this decision, Adams petitioned this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT

This Court's approach to the problem of retrospective decision making has gone through a series of evolutionary stages beginning with its holding in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), that the exclusionary rule announced in *Mapp* v. *Ohio*, 367 U.S. 643 (1961) would be limited to cases on direct review, and culminating in its decision in *Stovall* v. *Denno*, 388 U.S. 293 (1967) where this Court held that the principles announced in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) with respect to the right to counsel at pre-trial lineups would be applicable only to confrontations occurring after the date of decision establishing the right. The rule announced in *Stovall* represents the modern trend in retrospective decision making and should be applied in this case.

Though the relevant standard to be used in determining the retrospective application of a newly announced rule of criminal proceedure has changed, the underlying criteria established in *Linkletter* for deciding whether a new rule should be applied retrospectively in the first place have remained constant. The criteria are three: (a) the purpose to be served by the new standards; (b) the extent of reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards.

Application of the rule announced in *Stovall* v. *Denno* and the criteria established in *Linkletter* v. *Walker* to

the instant case dictates that *Coleman* v. *Alabama*, 399 U.S. 1 (1970) should be restricted to cases in which preliminary hearings were held after June 22, 1970.

In *Coleman*, it was indicated that the purpose to be served by requiring counsel for indigents at preliminary hearings was to protect the accused from being improperly bound over to the Grand Jury, to secure discovery of the state's cases, to fashion an impeachment tool for use at trial, and to make effective arguments on such matters as an early psychiatric examination or bail. These objectives do not require the retrospective application of *Coleman*.

The prevention of the improper binding over of an accused to the Grand Jury and the securing of bail bear no relation to the truth finding process. Furthermore, the preliminary hearing in Illinois is not a dependable source for discovery, impeachment or preservation of evidence, nor does there exist any authority for ordering a psychiatric examination at such hearing.

Nor can there be any doubt that there was substantial reliance on the proposition that counsel was not required at preliminary hearings where neither the acts nor omissions of the accused could be used against him at trial. At least thirty-five states and every Circuit Court of Appeals in this country so relied. This reliance on the old rule was entirely justified in light of this Court's decisions in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963).

Furthermore, the effect on the administration of justice if *Coleman* were to be applied retrospectively would be substantial. In Illinois, alone, literally hundreds of cases in each year prior to 1970 would be affected. The retrospective application of *Coleman* would necessitate hun-

dreds of hearings to determine whether the *Coleman* error was harmless and in many states, such as Illinois, transcripts of preliminary hearings in most cases will not be available.

However, even if this Court should hold that *Coleman* is to be applied retrospectively, it should not be applied to this case. Petitioner was represented by privately retained counsel at trial and there was no allegation in this motion to dismiss the indictment for failure to provide appointed counsel at the preliminary hearing that petitioner was indigent. Furthermore, there was no allegation of harm in any of petitioner's pre-trial or post-trial motions. Nor did petitioner ask that the case be remanded for a delayed preliminary hearing with his attorney. Rather, he asked that the entire indictment be dismissed. Under these circumstances, the trial court cannot be faulted for denying the motion to dismiss.

ARGUMENT

I.

THE APPLICATION OF COLEMAN V. ALABAMA SHOULD BE RESTRICTED TO CASES IN WHICH PRELIMINARY HEARINGS WERE HELD AFTER JUNE 22, 1970

A.

Introduction.

The use of prospective overruling is a new development in criminal cases. Its use in civil cases, though of more ancient vintage, is quite sparse.[1] Despite this novelty, the rules governing the limited retroactivity of judicial decisions developed rapidly.

On June 7, 1965, the Court made its first ruling that qualified the retrospective application of a new decision.[2]

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1. See generally Schafer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U. L. Rev. 631 (1967).

2. The Court had been urged to give full scale consideration to the issue of retrospective application of Gideon v. Wainwright, 372 U.S. 335 (1963) and Douglas v. California, 372 U.S. 353 (1963), but the Court did not do so. See Pickelsimer v. Wainwright, 375 U.S. 2, 3 (1963); Daegele v. Kansas, 375 U.S. 1 (1963). The same is true with respect to the application of Griffin v. Illinois, 351 U.S. 12, 25-26 (1956) (concurring opinion); Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (dissenting opinion).

In *Linkletter* v. *Walker,* 381 U.S. 618 (1965), the Court held that the rule excluding illegally seized evidence was limited to cases on direct review at the time the rule was announced and could not be used in a collateral attack upon the validity of a final judgment. It is clear that no more narrow standard of retrospective application was before the Court. 381 U.S. at 622. See also, *Johnson* v. *New Jersey,* 384 U.S. 719, 732 (1966). The Court used the same measure of retrospective application in two other cases. See *Angelet* v. *Fay,* 381 U.S. 654 (1965) (exclusion of illegally seized evidence); *Tehan* v. *Shott,* 382 U.S. 406 (1966) (prohibition of comment upon defendant's failure to testify).

On June 20, 1966, the Court considered for the first time a more narrow standard of retrospective application than that adopted in *Linkletter.* In *Johnson* v. *New Jersey,* 384 U.S. 719 (1966) the Court held that new rules requiring warnings of rights prior to interrogation would be applicable only to cases in which trial began subsequent to the date the new rules were announced.

This new standard of retrospective application was not the result of any new found rationale. The criteria for determining whether a new rule should be prospectively applied have remained basically unchanged since *Linkletter* was announced. "The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[3] The

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3. Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618, 636 (1965); Williams v. United States, 401 U.S. ——, 91 Sup. Ct. 1148, 1152 (1971).

new measure of restricted retrospective application in *Johnson* was adopted because under that measure "law enforcement officers and trial courts will have fair notice that statements taken in violation of [the new confession rules] may not be used." 384 U.S. at 732.

The decision in *Johnson* v. *New Jersey* seemed anomolous in one important respect. The act of reliance by law enforcement officers upon the old rules governing confessions did not occur at the time of the trial, but rather at the time interrogation took place. Certainly the measure of retrospectivity in terms of the timing of trial or review created arbitrary distinctions in individual cases and was largely unrelated to the timing of the act of reliance by law officers. See *Williams* v. *United States,* 401 U.S. ——, 91 Sup. Ct. 1148, 1155 n. 9.

On June 12, 1967, barely more than two years after *Linkletter,* the Court adopted a standard of limited retrospective application that was as consistent with the rationale of prospective overruling as the case or controversy requirement would allow. In *Stovall* v. *Denno,* 388 U.S. 293 (1967), it was held that the right to counsel at pre-trial identification procedures was to be applicable only to confrontations occurring after the date of the decisions establishing the right.

Stovall v. *Denno* represents the end point in a short but complete evolution of the retrospectivity doctrine in which the measure of retrospective application was narrowed until it became consistent with the rationale justifying limited retroactivity. Since *Stovall,* every retrospectivity question before the Court has been resolved in only one of two ways. Either the new rule has been made

fully retrospective[4] or the new rule has been applied only to cases where the prohibited act takes place after the date of the decision which prohibits it.[5]

There have been two exceptions to this consistent pattern. One involved rather special circumstances.[6] The other exceptional case did not present for decision a question of retrospectivity, but rather required interpretation of an existing decision. In *Jenkins* v. *Delaware*, 395 U.S. 213 (1969), the Court held that *Miranda* v. *Arizona*, 384 U.S. 436 (1966), was inapplicable to a case being retried after the date of the *Miranda* decision where the original trial occurred prior to *Miranda*. More

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4. Witherspoon v. Illinois, 391 U.S. 510 (1968); Roberts v. Russell, 392 U.S. 293 (1968); McConnell v. Rhay, 393 U.S. 2 (1968); Arsenault v. Massachusetts, 393 U.S. 5 (1968); Berger v. California, 393 U.S. 314 (1969). See Ashe v. Swenson, 397 U.S. 436, 437 n.1 (1970). Cf. United States v. United States Coin and Currency, 401 U.S. ——, 91 Sup Ct. 1041 (1971).

5. De Stefano v. Woods, 392 U.S. 631 (1968); Desist v. United States, 394 U.S. 244 (1969); Kaiser v. New York, 394 U.S. 280 (1969); Halliday v. United States, 394 U.S. 831 (1969); Hill v. California, 401 U.S. ——, 91 Sup. Ct. 1106 (1971); Williams v. United States, 401 U.S. ——, 91 Sup. Ct. 1148 (1971); United States v. White, 401 U.S. ——, 91 Sup Ct. 1122 (1971); See Mackey v. United States, 401 U.S. ——, 91 Sup. Ct. 1160 (1971).

6. Fuller v. Alaska, 393 U.S. 80 (1968) extended application of Lee v. Florida, 392 U.S. 378 (1968), to evidence introduced at trial after the date of the Lee decision. Lee, of course, required the exclusion of evidence secured in violation of a federal wiretap law. Accordingly, Fuller v. Alaska was concerned with consequences of acts by law enforcement officers that had been previously prohibited by a federal statute of many years standing.

importantly, the Court explicitly recognized that its approach to prospective decision making had undergone modification. 395 U.S. at 218, n.7; See also *Desist* v. *United States*, 394 U.S. 244, 252-53 (1969). The Court stated that the more recent trend in prospectivity decisions is to select "the date on which the prohibited practice was engaged in, rather than the date the trial commenced, to determine the applicability of newly formulated constitutional standards" (395 U.S. at 217), and to regard "as determinative the moment at which the discarded standards were first relied upon" (395 U.S. at 218).[7]

It is in light of these now well established measures and rationales that the applicability of *Coleman* v. *Alabama*, 399 U.S. 1 (1970) to this case must decided.

B.

The Purposes Served By The Right To Counsel At Preliminary Hearings Do Not Mandate Retrospective Application of Coleman v. Alabama.

> "Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect."

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7. The Court also quoted with approval the statement that "Sound growth can be promoted and erratic results avoided by focusing attention on the element of reliance that justifies [prospective overruling]". 395 U.S. at 218, n.7. The quotation is taken from an article by Mr. Justice Schaefer of the Court whose judgment is the present subject of review. See Schafer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U. L. Rev. 631, 646 (1967).

Williams v. *United States,* 401 U.S. ——, 91 Sup. Ct. 1148, 1152 (1971).

In *Coleman,* the Court thought that counsel at a preliminary hearing could prevent the unjustified holding or binding of a case to the Grand Jury and make effective arguments for bail. The Court further believed that counsel could, by cross-examination create material for impeachment at trial, secure discovery of the state's case, preserve testimony favorable to the accused and obtain early psychiatric examination of the accused. See *Coleman* v. *Alabama,* 399 U.S. at 9.

Obviously, the prevention of an improper holdover and the securing of bail have no relation to the truth finding aspect of a criminal trial. Indeed, if there were a significant weakness in the state's case at preliminary hearing, defense counsel would rightfully hesitate to bring it clearly to the surface at a preliminary stage of the proceeding for fear that the prosecution would repair the deficiency and refile or go to the Grand Jury.

The remainder of the purposes served by counsel at preliminary hearing may, at least in theory, bear upon the truth finding function at trial. This fact alone, however, does not command retrospective application of the new rule.

The standard is whether the previous absence of a right "substantially impairs [the] truth finding function." *Williams* v. *United States,* 401 U.S. at ——; 91 Sup. Ct. at 1152. And the extent to which a prohibited practice infects the integrity of the truth-determining process at trial is a "question of probabilities." *Stovall* v. *Denno,* 388 U.S. at 298; *Johnson* v. *New Jersey,* 384 U.S. at 729. The Court has also considered the extent to which alternative safeguards exist to serve the pur-

poses of the new rule. See *Johnson* v. *New Jersey,* 384 U.S. at 729.

Obviously there are clear cases on both ends of the spectrum. The illegal seizure of evidence does not affect its reliability and new Fourth Amendment rules have never received full retrospective application. See *Desist* v. *United States,* 394 U.S. at 250. The denial of the right to counsel at trial, on the other hand, must nearly always raise serious questions about the accuracy of guilty verdicts. See *Stovall* v. *Denno,* 388 U.S. at 297-98.

Where the cases are not within these simple areas, this Court has weighed the probabilities and has applied prospectively several rules the violation of which might have affected the reliability of the determination of guilt. The prohibition of comment on the defendant's silence and the right to jury trial were both protective, in part, of the integrity of the guilt-determination. Yet, despite explicit recognition of this, neither applies retrospectively. See *Johnson* v. *New Jersey,* 385 U.S. at 730. The rule requiring warnings of rights prior to interrogation and the right to counsel at certain identification procedures had the obvious purpose of ensuring that the question of guilt be reliably resolved yet the violation of the rules was held not to create a substantial likelihood that the results of many trials were factually incorrect. *Williams* v. *United States,* 401 U.S. ——; 91 Sup. Ct. at 1153-54, n. 7.

Judged by these rules and precedents, the role of counsel at preliminary hearing is not so vital as to require retrospective application of *Coleman.*

The most important function to be served by counsel is the securing of discovery and material for impeach-

ment. The request for a psychiatric examination[8] and the preservation of favorable evidence[9] would be rare occurrences even if defendant were represented by counsel. At the preliminary hearing stages of a case, defense counsel usually has no clear notion of whether psychiatric or any other kind of evidence is likely to be favorable. Even if he suspects such evidence will be helpful, he would be reluctant to commit his client to any particular form of defense without making the kind of thorough investigation that would be difficult to complete before preliminary hearing. Finally, even in the rare case where counsel wants to take affirmative steps at the preliminary hearing, he would be reluctant to do so for fear of giving the state very early notice of his defense. In any event,

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8. Although the Illinois Courts recognize the right of indigents to the services of scientific experts (People v. Watson, 36 Ill. 2d 288; 221 N.E. 2d 645 (1966)) the granting of a motion for a free psychiatrist is not automatic but rests within the discretion of the court. Furthermore, there is no provision for such a motion at the preliminary hearing. Illinois Revised Statutes, Ch. 38, Art. 109. The motion for a psychiatric examination, if made, is ordinarily made after arraignment and then usually under the provisions of Ill. Rev. Stat., Ch. 38, Sec. 104-2(d) which provisions, though applicable to questions of competency, are used also in cases of potential insanity defenses.

9. Most states, though not Illinois, provide for the preservation of testimony by means of evidence depositions. See 5 Wigmore, Evidence, Sec. 138, n.4, n.6 and Sec. 1401-18 (3rd Ed. 1940) and Note, 36 Temp. L. Q. 326, 331 for a collection of statutes. There are no statistics on their use but it is generally believed their use is rare. Certainly reported decisions involving evidence depositions are difficult to find.

the defendant who can show affirmatively that he was prejudiced by the loss of favorable testimony or that early psychiatric examination was vital to his case and was not performed all because of the absence of counsel at preliminary hearing may raise the question under Illinois law regardless of the prospective application of *Coleman* v. *Alabama*. See *People* v. *Bernatowicz*, 35 Ill. 2d 192, 198; 220 N.E. 2d 745, 748 (1966); *People* v. *Bonner*, 37 Ill. 2d 553, 561; 229 N.E. 2d 527, 532 (1967), *cert. denied* 392 U.S. 910 (1968).

In contrast to the highly unusual case where a defendant would require the preservation of favorable evidence or an early psychiatric examination, it may be argued by petitioner that nearly every defendant would seek discovery and the opportunity to create inconsistent statements at the preliminary hearing.[10]

Yet the preliminary hearing is not the best vehicle to achieve these purposes. In explaining 18 U.S.C. § 3060 (1968), the Committee on the Judiciary of the United States Senate observed that:

> "The preliminary hearing does not present an ideal opportunity for discovery. It is designed for another purpose; namely, that of determining whether there is probable cause to justify further proceedings against an arrested person. Thus, the degree of discovery obtained in a preliminary hearing will vary depending upon how much evidence the presiding

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10. It should be noted that pre-trial discovery of the prosecution's case is not required by the Constitution. See Augenblick v. United States, 393 U.S. 348 (1969). The furthest the Court has ever gone is to indicate a potential denial of due process in some cases where defendant is refused any pre-trial discovery of his statements to the police. See Clewis v. Texas, 386 U.S. 707, 712, n.8 (1967).

judicial officer thinks is necessary to establish probable cause in a particular case. This may be quite a bit, or it may be very little, but in either event it need not be all the evidence within the possession of the Government that should be subject to discovery.

'In addition, because it's fundamental purpose is to prevent unjustified restraints of liberty, the preliminary examination should be held within a short time after an accused is first arrested. Discovery, on the other hand, can most usefully take place at a later stage, much closer to trial, when the evidence is more nearly complete and defense counsel is better prepared . . .'" (Report No. 371, 90th Cong. 1st Sess.)

More importantly, Illinois has for many years allowed extensive discovery of the prosecution's case. See Illinois Revised Statutes, Chapter 38, Section 114-2 (bill of particulars); Section 114-9 (list of intended prosecution witnesses); Section 114-10 (production of confessions and lists of witnesses to the confessions); *People* v. *Gerold,* 265 Ill. 448, 107 N.E. 165 (1914); *People* v. *Buzan,* 351 Ill. 610, 184 N.E. 890 (1933).[11] With respect to impeachment of state witnesses, the defendant is entitled to all of their prior statements so long as they are in substantially verbatim form. See *People* v. *Moses,* 11 Ill. 2d 84, 142 N.E. 2d 1 (1957); *People* v. *Wolff,* 19 Ill. 2d 318, 167 N.E. 2d 197 (1959); *People* v. *Johnson,* 31 Ill. 2d 602, 203 N.E. 2d 399 (1964).

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11. Under Illinois Revised Statute, Ch. 38, Sec. 114-13, the Supreme Court of Illinois has the authority to establish discovery procedures by Rule of Court. It is expected that a comprehensive and expanded set of discovery rules will be promulgated at either the June or September 1971 Terms of Court.

The preliminary hearing in Illinois has been particularly unsuitable as a consistent means for fulfilling the purposes that motivated the *Coleman* decision. There is no requirement that preliminary hearings be attended by a court reporter or that a transcript be made.[12] *People* v. *Givans*, 83 Ill. App. 2d 423; 228 N.E. 2d 123 (1967); *People* v. *Ritchie*, 36 Ill. 2d 392, 396-97, 222 N.E. 2d 479 (1967). See *People* v. *Morris*, 30 Ill. 2d 406, 412; 197 N.E. 2d 433 (1964) (Schaefer, J. concurring). Probable cause may be determined on the basis of hearsay. *People* v. *Veldez*, 72 Ill. App. 2d 324; 214 N.E. 2d 675 (1966); *People* v. *Jones*, 75 Ill. App. 332; 221 N.E. 2d 29 (1966).[13] The hearing judge may terminate the proceedings once probable cause is established. *People* v. *Bonner*, 37 Ill. 2d 553, 560, 229 N.E. 2d 527, 531 (1967), *cert. denied* 392 U.S. 910 (1968). The defendant has no right to have a preliminary hearing.[14] *People* v. *Petruso*, 35 Ill. 2d 578, 221 N.E. 2d 276 (1966). Presumably, since the Court can terminate the proceeding once probable cause is established, the defense can be precluded from calling witnesses of its own. In short, the preliminary hearing in Illinois is not a dependable source of discovery, impeach-

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12. Other than in Cook County, the vast majority of preliminary hearings in Illinois are not attended by court reporters.

13. The rationale is that whatever is admissible before the grand jury is similarly admissible in preliminary hearings. See People v. Jones, 19 Ill. 2d 37, 166 N.E. 2d 1 (1960) and Costello v. United States, 350 U.S. 359 (1956) (scope of evidence before grand jury).

14. The 1970 Constitution of the State of Illinois (effective July 1, 1971) does establish a right to a preliminary hearing. See Article I, Sec. 7.

ment or preservation of evidence and there exists no authority to order psychiatric examination at such a hearing.[15]

The petitioner argues that *Coleman* must be retrospective for two reasons. First, he asserts that the evidence in this case was weak. (Petr's Brief A, Par. 13) The record does not, read as a whole, support this contention. By resting his argument on the particular state of the record in his case, he really concedes implicitly that it is not the general rule of *Coleman* he invokes. Rather, petitioner is saying that his case cannot stand because, in the particular circumstances, he was prejudiced by the absence of counsel. This is not an argument founded on *Coleman* v. *Alabama* but rather on *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963). That argument must fail, as petitioner well knows, because he never alleged any specific prejudice in the court below and never made, nor sought to make, any showing of what counsel might have done at the prelim-

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15. In one respect, the preliminary hearing in Illinois is fairly broad because the defense can move to suppress evidence, a motion not available in federal cases. Compare Ill. Rev. Stat. Ch. 38, Sec. 109-3(e) with Giordenello v. United States, 357 U.S. 480, 484 (1958). In some cases this may lead to some discovery, but most often the evidence on the preliminary hearing motion to suppress is purely hearsay and there is little incentive to develop the issue since the ruling at the preliminary motion has no binding effect. See Ill. Rev. Stat. Ch. 38, Sec. 109-3(e). Parenthetically, it might be noted that the retrospectivity of all exclusionary rules affects discovery in a collateral way. Requirements of standing and the elimination of the mere evidence rule diminish the necessity of motions to suppress and its attendant element of discovery. The application of new exclusionary rules has the reverse effect.

inary hearing to improve his position at trial.[16] It is manifest that the particular strength or weakness of a given record is irrelevant to the issue of whether *Coleman* should be given general retrospective application.

The petitioner's second argument is simply that *Coleman* involves the right to counsel. (Petr's Br. A. par. 4). Nothing, however, is clearer than the proposition that retrospectivity "is not automatically determined by the provision of the Constitution on which the dictate is based." This clear proposition comes from two decisions which held, respectively, that the right to counsel at interrogation and at line-ups was not retrospective. See *Johnson* v. *New Jersey*, 384 U.S. at 728; *Stovall* v. *Denno*, 388 U.S. at 297.

By comparison to the purposes served by the right to counsel established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967), the purposes served by the *Coleman* right to counsel are hardly of greater significance in relation to the reliability of guilty determination. Indeed, there are strong analogies between the *Wade-Gilbert* doctrine and the *Coleman* doc-

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16. The obvious allegation in this regard would concern the lack of cross-examination of the purchaser of narcotics, but the purchaser did not testify at preliminary hearing and there was no obligation on him to do so. In any event, Illinois has always provided a remedy for any specific prejudice shown from lack of counsel at the preliminary hearing. (See People v. Bonner, 37 Ill. 2d 553, 561; 229 N.E. 2d 527, 532 (1967), cert. denied 392 U.S. 910 (1968), and there exists a procedure for establishing further facts to support the claim of specific prejudice, Ill. Rev. Stat. Ch. 38, Sec. 122.

trine, analogies recognized by the Court in *Coleman*. See 399 U.S. at 7. The willingness of the Court to recognize the doctrine of harmless error with respect to violations of *Coleman* and *Wade* is another common feature and one that distinguishes them from other right to counsel cases. In *Phillips* v. *North Carolina*, 433 F. 2d 659, 662 (4th Cir. 1970), the Court held that *Coleman* was to be applied prospectively and stated:

> "To be sure if a preliminary hearing is held the accused gains important rights and advantages that can be effectively exercised only through his attorney. Counsel's function, however, differs from his function at trial. Broadly speaking, his role at the preliminay hearing is to advise, observe, discover the facts, and probe the state's case. In this respect he serves in somewhat the same capacity as counsel at lineups and interrogations, which are both pretrial stages of criminal proceedings where the right to counsel has not been held retroactive."

The analogy goes further still because a violation of *Coleman* like a violation of *Wade-Gilbert* does not necessarily mean that either the preliminary hearing or the line-up involved was, in fact, unfair. The blanket effect that *Coleman* would have on cases in which trial was perfectly fair[17] has been a prime factor in persuading courts to decline to apply *Coleman* retrospectively. See

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17. "The probability that the truth determining process was affected by the lack of counsel at preliminary hearings is minimal in the vast majority of cases. Most witnesses' stories at the preliminary hearing remain the same at trial. Testimony favorable to the accused is usually not available at the preliminary stage of the proceeding for counsel to preserve. Discovery is also unlikely at such an early stage of the proceedings since the Commonwealth has always been very reluctant to open its case before trial." Commonwealth v. Brown, 217 Pa. 190, 269 A 2d 383, 386 (1970).

Phillips v. *North Carolina*, 433 F. 2d 659, 662 (4th Cir. 1970); *United States ex rel. Bonner* v. *Pate*, 430 F. 2d 639 (7th Cir. 1969); *Konvalin* v. *Sigler*, 431 F. 2d 156 (8th Cir. 1970).

It appears that insofar as "purpose" is concerned, the doctrine of *Coleman* falls well within the parameters set by *Stovall* defining what doctrines may be applied prospectively. Beyond this, we believe a consideration of the factors of reliance and effect on the administration of justice will show that *Coleman* should be applied prospectively.

C.

There Was Substantial Justified Reliance On The Proposition That Counsel Was Not Required At Preliminary Hearings Where Neither The Acts Nor The Omissions Of Defendant Could Be Used Against Him At Trial.

In *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), the Court held that arraignment in Alabama was critical because certain rights must be asserted at arraignment or lost forever. The Court held that such a critical proceeding required appointment of counsel but recognized that under the various state laws arraignment could be structured so as to be non-critical, 368 U.S. at 54, N. 4.

In *White* v. *Maryland*, 373 U.S. 59 (1963) the petitioner's uncounselled plea of guilty at a preliminary hearing was used against him at trial and the Court held that, in such circumstances, the preliminary hearing was critical and counsel was required. The taking of a plea was the crucial factor. 373 U.S. at 60.

Hamilton and *White* when read together stated a coherent rule. The States could not bind a defendant at trial by his failure to object or raise an issue at a prelim-

inary state when the right to counsel had not been extended to him. Nor could the States use his admissions at trial if they were made at such a preliminary proceeding. The rule protected defendants from suffering at trial the consequences of their uncounselled acts and omissions at preliminary hearings. Accordingly, it seemed clear that if the States created a total insulation of the preliminary hearing from the trial, the *Hamilton-White* rule would be satisfied.

The nature of the proceedings involved in *Hamilton-White* "is fundamentally different from the preliminary hearings . . . in Coleman." *Phillips* v. *North Carolina*, 433 F. 2d 659, 661 (4th Cir. 1970).

This clear logical distinction between the preliminary proceedings in *Hamilton-White* and the typical preliminary hearing in Illinois was specifically relied upon by the Supreme Court of Illinois. See *People* v. *Morris*, 30 Ill. 2d 406, 410-412; 197 N.E. 2d 433 (1964); *People* v. *Bonner*, 37 Ill. 2d 553, 558-59, 229 N.E. 2d 527 (1967), *cert. denied*, 392 U.S. 910 (1968). In turn, the opinion in *People* v. *Morris* was relied upon by the trial court below.

Illinois was not alone in its reading of the applicable standards. Thirty-three jurisdictions made similar rulings.[18]

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18. Alabama: Coleman v. State, 211 So. 2d 917, 44 Ala. App. 429 (1968), *rev'd*, Coleman v. Alabama, 399 U.S. 1 (1970); Alaska: Merrill v. State, 423 P. 2d 686 (Alaska 1967), *cert. denied* 386 U.S. 1040 (1967); Arizona: State v. Miranda, 104 Ariz. 174, 450 P. 2d 364 (1969), *cert. denied* 396 U.S. 868 (1969); California: People v. Bryan, 3 Cal. App. 327, 83 Cal. Rptr. 291 (1970); Connecticut: United States ex rel. Cooper v. Reincke, 333 F. 2d 608 (2d Cir. 1964), *cert. denied*, 379 U.S. 909 (1964); Florida:

The petitioner argues that such reliance was unjustified after *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The petitioner's argument is specious. *Miranda* was fully in accord with the concept. If counsel was denied at interrogation, then the defendant's statements could not be used at trial. This sort of rule is completely consistent

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Montgomery v. State, 176 So. 2d 331 (Fla. 1965), *cert. denied*, 384 U.S. 1023 (1966); Georgia: Malignaro v. Balkcom, 221 Ga. 150, 143 S.E. 2d 748 (1965); Idaho: Freeman v. State, 87 Ida. 170, 392 P. 2d 542 (1964); Kansas: Ray v. State, 202 Kan. 144, 446 P. 2d 762 (1968); Kentucky: Howard v. Commonwealth, 446 S.W. 2d 293 (Ky. 1969); Maine: Nadeau v. State, 232 A. 2d 82 (Me. 1967), *vacated on rehearing*, 247 A. 2d 113 (Me. 1968); Maryland: Wallace v. State, 9 Md. App. 131, 262 A. 2d 789 (1970); Tyler v. State, 5 Md. App. 265, 246 A. 2d 634 (1968); Massachusetts: Commonwealth v. O'Leary, 347 Mass. 387, 198 N.E. 2d 403 (1964); Mississippi: Allred v. State, 187 So. 2d 28 (Miss. 1966); Missouri: State v. Ussery, 452 S.W. 2d 148 (Mo. (1970); Nebraska: State v. Sheldon, 179 Neb. 377, 138 N.W. 2d 428 (1965), *cert. denied*, 383 U.S. 930 (1966); Nevada: Payne v. Warden, Nevada State Prison, 85 Nev. 648, 461 P. 2d 406 (1969); New Hampshire: State v. Chase, 109 N.H. 296, 249 A. 2d 677 (1969); New Jersey: State v. Hale, 45 N.J. 225, 212 A. 2d 146 (1965), *appeal dismissed, cert. denied*, 384 U.S. 884 (1966); New York: People v. Smith, 29 A.D. 578, 285 N.Y.S. 2d 549 (1967); North Carolina: Gasque v. State, 271 N.C. 323, 156 S.E. 2d 740, *cert. denied*, 390 U.S. 1030 (1967); North Dakota: State v. Starratt, 153 N.W. 2d 311 (N.D. 1967); Ohio: Tabor v. Maxwell, 3 Ohio St. 2d 106, 209 N.E. 2d 206 (1965); Oklahoma: Dorrough v. State, 452 P. 2d 816 (Okla. Crim. 1969), Speer v. Page, 466 P. 2d 624 (Okla. Crim. 1968); Pennsylvania: Commonwealth v. Frye, 433 Pa. 473, 252 A. 2d 580 (1969), *cert. denied*, 396 U.S. 932 (1969); Rhode Island: State v. Nettis, 78 R.I. 489, 82 A. 2d 852 (1951); South Carolina: State v. Redding, 252

with *Hamilton* and *White* and there is nothing in *Miranda* to suggest that anything more than insulating the trial from the products of a pre-trial counselless proceeding was required.

There was, in short, no clear foreshadowing of the *Coleman* rule. No prior decision had announced the rule in *Coleman* and the reliance on the *Hamilton-White* rule was substantial. See *Phillips* v. *North Carolina*, 433 F. 2d 659 (4th Cir. 1970); *Konvalin* v. *Sigler*, 431 F. 2d 1156 (8th Cir. 1970); *Commonwealth* v. *Brown*, 217 Pa. Super. 190, 269 A 2d 383 (1970) *Locke* v. *Erickson*, 181 N.W. 2d 100 (S.D. 1970).

Finally, it is clear that the reliance of the States was not based solely upon State precedents. Every Circuit Court of Appeals in this country had held that there was no federal constitutional requirement for counsel at the type of preliminary hearings where rights cannot be sacrificed or lost. *Pagan Cancel* v. *Delgado*, 408 F. 2d 1018

S.C. 312, 166 S.E. 2d 219 (1969), *cert. denied*, 397 U.S. 940 (1970); South Dakota: State v. Jameson, 78 S.D. 431, 104 N.W. 2d 45 (1960); Tennessee: Schoonover v. State, 448 S.W. 2d 90 (Tenn. Crim. App. 1969); Texas: Branch v. State, 445 S.W. 2d 756 (Tex. Crim. App. 1969); Utah: Crouch v. State, 24 Utah 2d 126, 467 P. 2d 43 (1970); Virginia: Duffield v. Peyton, 209 Va. 178, 162 S.E. 2d 915 (1968); Washington: State v. Callas, 68 Wash. 2d 542, 413 P. 2d 962 (1966), *cert. denied*, 390 U.S. 970 (1968); West Virginia: Raleigh v. Coiner, 302 F. Supp. 1151 (N.D. W. Va. 1969); Martin v. Coiner, 299 F. Supp. 553 (S.D. W. Va. 1969).

A survey conducted by Respondent of states without recently reported cases on the subject revealed that the states of Montana and Arkansas also relied heavily on the old rule.

(1st Cir. 1969); *United States ex rel. Cooper v. Reincke*, 333 F. 2d 608 (2d Cir. 1964), *cert. denied*, 379 U.S. 909, (1964); *United States ex rel. Budd* v. *Maroney*, 398 F. 2d 806 (3d Cir. 1968); *DeToro* v. *Pepersack*, 332 F. 2d 341 (4th Cir. 1964), *cert. denied*, 379 U.S. 909 (1964); *Walker* v. *Wainwright*, 409 F. 2d 1311 (5th Cir. 1969), *cert. denied*, 396 U.S. 894, (1969); *Waddy* v. *Heer*, 383 F. 2d 789 (6th Cir. 1967), *cert. denied*, 392 U.S. 911 (1968); *Butler* v. *Burke*, 360 F. 2d 118 (7th Cir. 1966), *cert. denied*, 385 U.S. 835, (1966); *Pope* v. *Swenson*, 395 F. 2d 321 (8th Cir. 1968); *Wilson* v. *Harris*, 351 F. 2d 840 (9th Cir. 1965), *cert. denied*, 383 U.S. 951, (1966); *Latham* v. *Crouse*, 320 F. 2d 120 (10th Cir. 1963), *cert. denied*, 375 U.S. 959, (1963); *Headen* v. *United States*, 115 U.S. App. D.C. 81, 317 F. 2d 145 (1963).

Under these circumstances, the contention that the State trial courts should have known that counsel at preliminary hearing was an absolute requirement is meritless.

D.

The Effect On The Administration Of Justice Of A Retrospective Application Of Coleman v. Alabama Would Be Substantial And Highly Undesirable.

In the third section of his brief, petitioner virtually concedes that application of *Coleman* v. *Alabama* should have only limited retrospective application. He argues that *Coleman* should be applied only to cases in which defendants objected to the absence of counsel at preliminary hearing prior to trial. He states bluntly that "all other defendants, by proceeding to trial with a lawyer

waived the point."[19] Then petitioner concludes that, viewed in this perspective, *Coleman's* effect on past cases is minimal. Petitioner has been able to find only six cases other than his own where the issue was raised in the trial court in Illinois.

The petitioner's attempt to limit the retrospective effect of *Coleman* proceeds from his realization that to advocate full retrospectivity is to advocate chaos. His argument is, of course, inconsistent with his confident claim that after *Miranda* v. *Arizona*, 384 U.S. 436 (1966) the right to counsel at preliminary hearings was perfectly clear. Obviously, it was not so very clear for if it were, petitioner would find far more than six reported cases where the issue was raised in the trial court.

Unfortunately, there can be no measure of the number of cases which a fully retrospective application of *Coleman* would affect in Illinois. The reason for this is the variation in local practice. Illinois, like many other states, provides counsel at preliminary hearings on an irregular and unpredictable basis. There is a wide variation among the counties on the appointment of counsel and, even within single counties, the practice may vary. There would be hundreds of cases for each year in Illinois prior to 1970 in which counsel was not provided at preliminary hearing and the further back the year, the larger the

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19. The attorneys for the respondent are also attorneys for the wardens of the various state penal institutions and bear the responsibility for responding to petitions for habeas corpus relief. It is more than slightly tempting to indorse petitioner's "waiver" rule if there were any assurance that it would apply generally to federal review of state convictions.

number of cases. As recently as 1965 approximately two-thirds of the states did not appoint counsel for preliminary hearings. ABA, Standards Relating To Providing Defense Services, 44 (Approved Draft 1968). Until 1964, the federal courts did not provide counsel. See 18 U.S.C. 3006 A(b) (1964). There can hardly be any question that the effect of a retrospective application of *Coleman* would affect far more cases than would the retrospective application of *Griffin* v. *California*, 380 U.S. 609 (1965) or *Katz* v. *United States*, 389 U.S. 347 (1967). See *Desist* v. *United States*, 394 U.S. 244, 251 (1969). In several jurisdictions, the gravity of a retrospective application has been explicitly recognized. See *Phillips* v. *North Carolina*, 433 F. 2d 659, 663 (4th Cir. 1970); *State* v. *Riley*, 100 Ariz. 318, 475 P. 2d 932 (Ariz. 1970); *Docke* v. *Erickson*, 181 N.W. 2d 100 (S.D. 1970). One Court of Appeals has said that a retrospective application of *Coleman* "would be the genesis for literally hundreds of post-conviction evidentiary hearings which in sheer numbers would virtually shatter the bounds of reality." *Konvalin* v. *Sigler*, 431 F. 2d 1156, 1160 (8th Cir. 1970).

The retrospective application of *Coleman* would present further special problems. If *Coleman* were to be applied to all past cases, it would require that evidentiary hearings be held to determine whether the *Coleman* error was harmless. *Coleman* v. *Alabama*, 399 U.S. at 10-11. In many cases, as in much of Illinois, no transcript of the preliminary hearing will be available. See *Phillips* v. *North Carolina*, 433 F. 2d 659, 663 (4th Cir. 1970). Even where the record was available the issue could not be resolved by consideration of the record alone. Fact determinations concerning matters transpiring years earlier would be required frequently. And there would be the further necessity of determining whether, in light of du-

bious reconstructions of facts, the error at the preliminary hearing "tainted" the trial. The Court has previously frowned on the necessity for requiring such excessively subtle resolutions of taint issues years after the fact. See *Desist* v. *United States*, 394 U.S. 244, (1969); *Stoval* v. *Denno*, 388 U.S. 293, 300 (1967).

E. Conclusion.

The failure to provide counsel at the preliminary hearing below did not, of course, constitute knowingly unconstitutional conduct. There is therefore no reason to apply *Colema* v. *Alabama* to this case merely because it is pending on direct review. See *Desist* v. *United States*, 394 U.S. 244, 254 (1969). Instead, the *Coleman* rule should be applicable only to those cases in which the preliminary hearing was held after the date of the *Coleman* decision.

The Supreme Court of Illinois, whose thoroughness and care in this case petitioner does not challenge, held that *Coleman* v. *Alabama* should not apply retrospectively. Its judgment in this regard has been echoed by every court that has had to decide the issue. See *Olsen* v. *Ellsworth*, 438 F. 2d 630 (9th Cir. 1971); *Brown* v. *Craven*, 438 F. 2d 334 (9th Cir. 1971); *Phillips* v. *North Carolina*, 433 F. 2d 659 (4th Cir. 1970); *Harris* v. *Neil*, 437 F. 2d 63 (6th Cir. 1971); *Konvalin* v. *Sigler*, 431 F. 2d 1156 (8th Cir. 1970); *United States ex rel. Bonner* v. *Pate*, 439 F. 2d 639 (7th Cir. 1970); *Noe* v. *Cox*, 320 F. Supp. 849 (W.D. Va. 1970); *Crow* v. *Coiner*, 323 F. Supp. 555 (N.D. W. Va. 1971); *Akins* v. *State*, 243 So. 2d 385 (Ala. Crim. App. 1971); *State* v. *Riley*, 106 Ariz. 318, 475 P. 2d 932 (1970); *Billings* v. *State*, 10 Md. App. 31, 267 A. 2d 808 (1970); *State* v. *Gaffey*, 457 S.W. 2d 657 (Mo. 1970); *State* v. *Chapman*, 465 S.W. 2d 472 (Mo. 1971); *State* v. *Dutton*,

112 N.J. Super 402, 271 A. 2d 593 (1970); *Commonwealth* v. *James*, 440 Pa. 205, 269 A. 2d 383 (1970); *Commonwealth* v. *Brown*, 217 Pa. Super. 190, 269 A. 2d 383 (1970); *Locke* v. *Erickson*, 181 N.W. 2d 100 (S.D. 1970).

We ask that its judgment now be affirmed.

II.

COLEMAN V. ALABAMA SHOULD NOT BE APPLIED TO THIS CASE EVEN IF IT IS HELD TO BE FULLY RETROSPECTIVE.

The protection of *Coleman* v. *Alabama*, 399 U.S. 1 (1970) is intended for the indigent defendant who is unable to realize on his own the advantages of an attorney's assistance. 399 U.S. at 9-10. The petitioner in this case was represented by privately retained counsel. It was only for purposes of appeal and, of course, after trial that petitioner availed himself of the right to appointed counsel. Further, the petitioner's motion to dismiss the indictment, drafted by his attorneys, did not allege indigency. Under these conditions the petitioner has not sustained his burden of proving his inability to hire an attorney at the preliminary hearing. It is clear that petitioner must meet this burden. See *Kitchens* v. *Smith*, 401 U.S. ——; 91 Sup. Ct. 1089, 1090 (1971).

Furthermore, the petitioner never made an allegation of harm either in his pre-trial motion to dismiss or in his post trial motions. Surely if any harm had occurred, it would have been most apparent and easiest to prove at that time. The unjustifiable absence of any allegation of harm at the trial level should preclude the granting of relief under *Coleman*.

Finally, the petitioner sought an unwarranted remedy, to wit, dismissal of the indictment. At best, petitioner would have been entitled to a delayed preliminary hearing or to a hearing to show irreparable harm. He sought neither, but instead asked the trial court to dismiss the indictment without any showing of harm. Under the circumstances, the trial court cannot be faulted for denying the motion to dismiss.

CONCLUSION

The State of Illinois respectfully requests that the judgment of the Supreme Court of Illinois be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 70-5038

JOHN ADAMS,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Illinois affirming the conviction of petitioner for the sale of narcotics is reported at 46 Ill. 2d 200, 263 N.E.2d 490.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 30, 1970. The petition for certiorari was filed on October 21, 1970, and granted on March 8,

1971. The jurisdiction of this Court is based upon 28 U.S.C. 1257(3).

QUESTION PRESENTED

The Court limited its grant of certiorari to the following single question:

1. Whether *Coleman v. Alabama*, 399 U.S. 1 (1970), is retroactive and/or applicable to a cause where, prior to trial, the defendant objected to the failure to provide counsel at the preliminary hearing?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV, Section 1:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner was arrested on January 4, 1967, for the sale of narcotics and appeared before the Honorable Kenneth Wendt, a judge of the Circuit Court of Cook County, on February 10, 1967. Although petitioner had no lawyer, the court, without appointing counsel, proceeded to conduct a preliminary hearing. A witness (Police Officer Willis Nance) was sworn and testified against Petitioner; Petitioner was not given an opportunity to cross examine, nor to testify, nor to call witness in his behalf and Petitioner was thereupon held to the Cook County Grand Jury.

The said Grand Jury subsequently returned an indictment charging Petitioner with the sale of narcotics on January 4, 1967.

Prior to trial Petitioner moved the trial court, the Honorable Jacques F. Heilingoether, presiding Judge, to dismiss the indictment on the ground that his Constitutional guarantees under the United States Constitution, Amendments VI and XIV, had been denied by the failure to appoint counsel at the preliminary hearing, as aforesaid. In support of said motion, Petitioner set forth in full as an exhibit a transcript of the proceedings at the preliminary hearing. The trial court denied the motion to dismiss the indictment and the cause proceeded to trial.

The evidence for the People of the State of Illinois was exceptionally weak. It consisted almost entirely of the testimony of the alleged purchaser who was himself a narcotic addict, a previously convicted felon, a paid employee of the police department, and one who had perjured himself before the same Grand Jury (with respect to his true name) which indicted Petitioner. For several extended periods of time this alleged purchaser was out of the view of the arresting police officers, at places unknown to them. No marked money nor narcotics were found in the possession of the defendant-petitioner, who took the stand and denied the alleged $19.00 sale of narcotics.

However, the trial court chose to believe the informer and found the defendant-petitioner guilty and sentenced him to the penitentiary for a term of not less than ten (10) years nor more than thirteen (13) years.

SUMMARY OF ARGUMENT

Under any relevant test promulgated since *Linkletter v. Walker*, 381 U.S. 618 (1965), *Coleman v. Alabama*, 399 U.S. 1 (1970), should be accorded full applicability and retroactivity to the case at bar.

ARGUMENT

Linkletter v. Walker, 381 U.S. 618, was the first decision to deal with the problem of the retroactivity of another decision of the Court (*Mapp v. Ohio*, 367 U.S. 643).

According to *Stoval v. Denno*, 388 U.S. 293 (holding *United States v. Wade*, 388 U.S. 218, and *Gilbert v. California*, 388 U.S. 265, of prospective application only), *Linkletter* established a three-pronged criteria for resolution of the question of retroactivity:

> "(a) The purpose to be served by the new standards,
>
> "(b) The extent of reliance by law enforcement authorities on the old standards, and
>
> "(c) The effect on the administration of justice of a retroactive application of the new standards." (388 U.S. at 297.)

As we read *Williams v. United States*, and *Elkanich v. United States*, ___ U.S. ___, 9 Cr. L. 3015 (decided April 6, 1971, holding nonretroactive *Chimel v. California*, 395 U.S. 752), the relevant test of retroactivity is whether:

> ". . . the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts, in past trials . . . ." (___ U.S. ___, 9 Cr. L. 3017.)

If so, the "new" constitutional doctrine "has been given complete retroactive effect." 9 Cr. L. 3017.

Respectfully, we submit that applying any of the above tests to the case at bar, *Coleman v. Alabama*, 399 U.S. 1, should be held fully retroactive and applicable to the case *sub judice*.

A. "THE PURPOSE TO BE SERVED BY THE NEW STANDARDS"

We are reluctant to label an accused's right to counsel at the preliminary hearing a "new standard." As delineated below under B, petitioner takes the position that *Coleman v. Alabama*, 399 U.S. 1, decided nothing "new."

But if we are in error on this assessment, clearly the purpose of the *Coleman* rule requiring counsel at the preliminary hearing is to enhance the integrity of the fact finding process. We can not improve upon the words of Mr. Justice Brennan in *Coleman* stating the Court's reasons for holding that the Constitution requires counsel at the preliminary hearing:

> "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case, that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." (90 S. Ct. 2003.)

In the instant case, where the evidence of Petitioner's guilt was very weak (see Statement) retroactive application is justified because the *Coleman v. Alabama* Rule affects "the very integrity of the fact-finding process" and averts

"the clear danger of convicting the innocent." (*Johnson v. New Jersey*, 384 U.S. 719, 727-728.)

Petitioner also submits that a second, but by no means subordinate purpose of the *Coleman* Rule is that:

> "the right to counsel . . . [is] . . . so fundamental to our system of justice and so closely associated with guilt determination that society, and therefore the judicial system cannot accept a criminal judgment as final without the State being put to its full burden of proof by a trained adversary. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Any lesser standard places each individual as well as democracy in jeopardy. Without the finding of legal guilt beyond the most current standard of reasonable doubt, the validity of the conviction can never be completely without doubt, making subsequent or continued incarceration improper." *Retroactivity in Criminal Procedure Decisions*, 55 Iowa L. Rev. 1309 (1969-1970).

Petitioner thus submits that the purposes for the *Coleman v. Alabama* (399 U.S. 1) Rule mandate that the same be retroactive.

B. "THE EXTENT OF THE RELIANCE BY LAW ENFORCEMENT AUTHORITIES ON THE OLD STANDARDS"

Once again, we are reluctant to refer to pre-*Coleman v. Alabama* (399 U.S. 1) law as "the old standards." This is because Petitioner's counselless preliminary hearing took place on February 10, 1967. As of that date, law enforcement knew or should have well known, that the Constitution required counsel *at a trial, Gideon v. Wainwright*, 372 U.S. 335 (held retroactive in *Pickelsimer v. Wainwright*, 375 U.S. 2); *on appeal, Douglas v. California*, 372 U.S. 353 (held retroactive in *Daegele v. Kansas*, 375 U.S. 1); *at an arraignment where prejudice existed, Hamilton v. Alabama*, 368 U.S. 52; as well as *at arraignment where no prejudice was shown, White v. Maryland*, 373 U.S. 59 (held retroac-

tive in *Arsenault v. Massachusetts*, 393 U.S. 5 (1968)); *in recidivist proceedings, Greer v. Betto*, 384 U.S. 269 (1966); and even *in a police station, Miranda v. Arizona*, 384 U.S. 436 (1966) (held retroactive from the date of June 13, 1966, *Johnson v. New Jersey*, 384 U.S. 719, 721).

It is inconceivable that "law enforcement authorities" in February, 1967 should recognize an accused's right to appointed counsel in a police station (*Miranda v. Arizona*, 384 U.S. 436) but deny same in a court of law!

If the law enforcement authorities relied upon the "old standards" in February, 1967, it must have been the long discredited *Betts v. Brady*, 316 U.S. 455, standards.

Any supposed "reliance" by law enforcement authorities on some nebulous "old standard" at least since *Miranda v. Arizona*, 384 U.S. 436 (decided some eight (8) months prior to the denial of counsel in the case at bar). was voluntary on their part and completely unjustified.

C. "EFFECT ON THE ADMINISTRATION OF JUSTICE OF A RETROACTIVE APPLICATION OF THE NEW STANDARDS"

We come now to the real crux. In its opinion in the case at bar, the Illinois Supreme Court refused to hold *Coleman v. Alabama*, 399 U.S. 1, retroactive because such would have a "far reaching and grievous effect on the administration of justice" to the result that "thousands of cases without doubt would have to be reconsidered in light of the new requirement." (263 N.E.2d at 494.)

That is simply not the fact.

It is hornbook law, and no citation is necessary for the proposition that if an accused goes to trial and does not object to a certain procedure or bit of evidence, he may not object for the first time on appeal. There may be, and probably are "thousands" of convicted felons who did not have appointed counsel at their preliminary hearing. But if they had counsel at their trial, and counsel at the prelimi-

nary hearing (as did your petitioner), certainly there was a voluntary relinquishment of the right to counsel at that preliminary proceeding. Such is no different from a failure to object to a confession or illegally seized evidence. The failure to object at the trial where the accused has a lawyer is a full and complete waiver of the right to counsel at the preliminary hearing.

Our research had disclosed but six (6) Illinois cases, other than the case at bar, where the issue was raised in the trial courts: *People v. Bonner*, 37 Ill. 2d 553; *People v. Daniels*, 49 Ill. App. 2d 48, 199 N.E.2d 33; *People v. Smith*, 108 Ill. App. 2d 215, 247 N.E.2d 161; and *People v. O'Neal*, 118 Ill. App. 2d 116, 254 N.E.2d 559; *People v. Morris*, 30 Ill. 2d 406, 197 N.E.2d 433, and *People v. Masterson*, 45 Ill. 2d 499, 259 N.E.2d 794.

All other defendants, by proceeding to trial with a lawyer waived the point.

CONCLUSION

Under any relevant test, the decision in *Coleman v. Alabama*, 399 U.S. 1, should be held retroactive to the case at bar.

The *Coleman* decision makes evident the proposition that counsel at the preliminary hearing affects the very integrity of the fact-finding process.

Respectfully petitioner urges the reversal of his convictions.

Respectfully submitted,

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ADAMS *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 70-5038. Argued December 7, 1971—Decided March 6, 1972

Petitioner's pretrial motion to dismiss the indictment against him because of the court's failure to appoint counsel to represent him at the preliminary hearing in 1967 was denied, and petitioner was tried and convicted. The Illinois Supreme Court affirmed on the ground that *Coleman* v. *Alabama*, 399 U. S. 1, in which this Court held that a preliminary hearing is a critical stage of the criminal process at which the accused is constitutionally entitled to assistance of counsel, did not have retroactive application. *Held:* The judgment is affirmed. Pp. 280–286.

46 Ill. 2d 200, 263 N. E. 2d 490, affirmed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE WHITE, concluded that *Coleman* v. *Alabama*, *supra*, does not apply retroactively to preliminary hearings conducted before June 22, 1970, when *Coleman* was decided. Pp. 280–285.

MR. CHIEF JUSTICE BURGER concurred in the result, concluding, as set forth in his dissent in *Coleman*, that there is no *constitutional* requirement that counsel should be provided at preliminary hearings. Pp. 285–286.

MR. JUSTICE BLACKMUN concurred in the result, concluding that *Coleman* was wrongly decided. P. 286.

BRENNAN, J., announced the Court's judgment and delivered an opinion, in which STEWART and WHITE, JJ., joined. BURGER, C. J., filed an opinion concurring in the result, *post*, p. 285. BLACKMUN, J., filed a statement concurring in the result, *post*, p. 286. DOUGLAS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 286. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Edward M. Genson argued the cause for petitioner. With him on the brief were *Charles B. Evins*, *R. Eugene Pincham*, and *Sam Adam*.

E. James Gildea argued the cause for respondent. On the brief were *William J. Scott*, Attorney General of

Illinois, *Joel M. Flaum*, First Assistant Attorney General, and *James B. Zagel* and *James R. Streicker*, Assistant Attorneys General.

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion, in which MR. JUSTICE STEWART and MR. JUSTICE WHITE join.

In *Coleman* v. *Alabama*, 399 U. S. 1, decided June 22, 1970, we held that a preliminary hearing is a critical stage of the criminal process at which the accused is constitutionally entitled to the assistance of counsel. This case presents the question whether that constitutional doctrine applies retroactively to preliminary hearings conducted prior to June 22, 1970.

The Circuit Court of Cook County, Illinois, conducted a preliminary hearing on February 10, 1967, on a charge against petitioner of selling heroin. Petitioner was not represented by counsel at the hearing. He was bound over to the grand jury, which indicted him. By pretrial motion he sought dismissal of the indictment on the ground that it was invalid because of the failure of the court to appoint counsel to represent him at the preliminary hearing. The motion was denied on May 3, 1967, on the authority of *People* v. *Morris*, 30 Ill. 2d 406, 197 N. E. 2d 433 (1964). In *Morris* the Illinois Supreme Court held that the Illinois preliminary hearing was not a critical stage at which the accused had a constitutional right to the assistance of counsel. Petitioner's conviction was affirmed by the Illinois Supreme Court, which rejected petitioner's argument that the later *Coleman* decision required reversal. The court acknowledged that its *Morris* decision was superseded by *Coleman*,[1] but

[1] The Illinois Supreme Court stated, 46 Ill. 2d, at 205–206, 263 N. E. 2d, at 493,

"A preliminary hearing in Alabama, as in Illinois, has the purpose of determining whether there is probable cause to believe an offense

held that *Coleman* applied only to preliminary hearings conducted after June 22, 1970, the date *Coleman* was decided. 46 Ill. 2d 200, 263 N. E. 2d 490 (1970). We granted certiorari limited to the question of the retroactivity of *Coleman*. 401 U. S. 953 (1971). We affirm.

The criteria guiding resolution of the question of the retroactivity of new constitutional rules of criminal procedure "implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). We have given complete retroactive effect to the new rule, regardless of good-faith reliance by law enforcement authorities or the degree of impact on the administration of justice, where the "major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials . . . ." *Williams* v. *United States*, 401 U. S. 646, 653 (1971). Examples are the right to counsel at trial, *Gideon* v.

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has been committed by the defendant . . . . In both States the hearing is not a required step in the process of prosecution, as the prosecutor may seek an indictment directly from the grand jury, thereby eliminating the proceeding. . . . In neither State is a defendant required to offer defenses at the hearing at the risk of being precluded from raising them at the trial itself. . . . We conclude that the preliminary hearing procedures of Alabama and Illinois are substantially alike and we must consider because of *Coleman* v. *Alabama* . . . that a preliminary hearing conducted pursuant to section 109–3 of the Criminal Code (Ill. Rev. Stat. 1969, ch. 38, par. 109–3) is a 'critical stage' in this State's criminal process so as to entitle the accused to the assistance of counsel."

A right to a preliminary hearing has been constitutionally established, effective July 1, 1971. Illinois Constitution of 1970, Art. I, § 7.

Wainwright, 372 U. S. 335 (1963); on appeal, *Douglas* v. *California*, 372 U. S. 353 (1963); or at some forms of arraignment, *Hamilton* v. *Alabama*, 368 U. S. 52 (1961). See generally *Stovall* v. *Denno*, *supra*, at 297–298; *Williams* v. *United States*, *supra*, at 653 n. 6.

However, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree," *Johnson* v. *New Jersey*, 384 U. S. 719, 728–729 (1966); it is a "question of probabilities." *Id.*, at 729. Thus, although the rule requiring the assistance of counsel at a lineup, *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967), is "aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence," we held that the probabilities of infecting the integrity of the truth-determining process by denial of counsel at the lineup were sufficiently less than the omission of counsel at the trial itself or on appeal that those probabilities "must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall* v. *Denno*, *supra*, at 298.

We hold that similarly the role of counsel at the preliminary hearing differs sufficiently from the role of counsel at trial in its impact upon the integrity of the factfinding process as to require the weighing of the probabilities of such infection against the elements of prior justified reliance and the impact of retroactivity upon the administration of criminal justice. We may lay aside the functions of counsel at the preliminary hearing that do not bear on the factfinding process at trial—counsel's help in persuading the court not to hold the accused for the grand jury or meanwhile to admit the accused to bail. *Coleman*, 399 U. S., at 9. Of counsel's other functions—to "fashion a vital impeach-

ment tool for use in cross-examination of the State's witnesses at the trial," to "discover the case the State has against his client," "making effective arguments for the accused on such matters as the necessity for an early psychiatric examination . . . ," *ibid.*—impeachment and discovery may make particularly significant contribution to the enhancement of the factfinding process, since they materially affect an accused's ability to present an effective defense at trial. But because of limitations upon the use of the preliminary hearing for discovery and impeachment purposes, counsel cannot be as effectual as at trial or on appeal. The authority of the court to terminate the preliminary hearing once probable cause is established, see *People* v. *Bonner*, 37 Ill. 2d 553, 560, 229 N. E. 2d 527, 531 (1967), means that the degree of discovery obtained will vary depending on how much evidence the presiding judge receives. Too, the preliminary hearing is held at an early stage of the prosecution when the evidence ultimately gathered by the prosecution may not be complete. Cf. S. Rep. No. 371, 90th Cong., 1st Sess., 33, on amending 18 U. S. C. § 3060. Counsel must also avail himself of alternative procedures, always a significant factor to be weighed in the scales. *Johnson* v. *New Jersey*, 384 U. S., at 730. Illinois provides, for example, bills of particulars and discovery of the names of prosecution witnesses. Ill. Rev. Stat., c. 38, §§ 114–2, 114–9, 114–10 (1971). Pretrial statements of prosecution witnesses may also be obtained for use for impeachment purposes. See, *e. g.*, *People* v. *Johnson*, 31 Ill. 2d 602, 203 N. E. 2d 399 (1964).

We accordingly agree with the conclusion of the Illinois Supreme Court, "On this scale of probabilities, we judge that the lack of counsel at a preliminary hearing involves less danger to 'the integrity of the truth-determining process at trial' than the omission of counsel at the trial

itself or on appeal. Such danger is not ordinarily greater, we consider, at a preliminary hearing at which the accused is unrepresented than at a pretrial line-up or at an interrogation conducted without presence of an attorney." 46 Ill. 2d, at 207, 263 N. E. 2d, at 494.[2]

We turn then to weighing the probabilities that the denial of counsel at the preliminary hearing will infect the integrity of the factfinding process at trial against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice. We do not think that law enforcement authorities are to be faulted for not anticipating *Coleman*. There was no clear foreshadowing of that rule. A contrary inference was not unreasonable in light of our decisions in *Hamilton* v. *Alabama*, 368 U. S. 52, and *White* v. *Maryland*, 373 U. S. 59 (1963). *Hamilton* denominated the arraignment stage in Alabama critical because defenses not asserted at that stage might be forever lost. *White* held that an uncounseled plea of guilty at a Maryland preliminary hearing could not be introduced by the State at trial. Many state courts not unreasonably regarded *Hamilton* and *White* as fashioning limited constitutional rules governing preliminary hearings. See, *e. g.*, the decision of the Illinois Supreme Court in *People* v. *Morris*, 30 Ill. 2d 406, 197 N. E. 2d 433. Moreover, a

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[2] Accord: *Phillips* v. *North Carolina*, 433 F. 2d 659, 662 (1970), where the Court of Appeals for the Fourth Circuit observed:

"To be sure, if a preliminary hearing is held, the accused gains important rights and advantages that can be effectively exercised only through his attorney. Counsel's function, however, differs from his function at trial. Broadly speaking, his role at the preliminary hearing is to advise, observe, discover the facts, and probe the state's case. In this respect he serves in somewhat the same capacity as counsel at lineups and interrogations, which are both pretrial stages of criminal proceedings where the right to counsel has not been held retroactive."

number of courts, including all of the Federal Courts of Appeals had concluded that the preliminary hearing was not a critical stage entitling an accused to the assistance of counsel.[8] It is thus clear there has been understandable and widespread reliance upon this view by law enforcement officials and the courts.

It follows that retroactive application of *Coleman* "would seriously disrupt the administration of our criminal laws." *Johnson* v. *New Jersey*, 384 U. S., at 731. At the very least, the processing of current criminal calendars would be disrupted while hearings were conducted to determine whether the denial of counsel at the preliminary hearing constituted harmless error. Cf. *Stovall* v. *Denno*, 388 U. S., at 300. The task of conducting such hearings would be measurably complicated by the need to construct a record of what occurred. In Illinois, for example, no court reporter was present at pre-*Coleman* preliminary hearings and the proceedings are therefore not recorded. See *People* v. *Givans*, 83 Ill. App. 2d 423, 228 N. E. 2d 123 (1967). In addition, relief from this constitutional error would require not merely a new trial but also, at least in Illinois, a new preliminary hearing and a new indictment. The impact upon the administration of the criminal law of that requirement needs no elaboration. Therefore, here also, "[t]he unusual force of the countervailing considerations strengthens our con-

[8] *Pagan Cancel* v. *Delgado*, 408 F. 2d 1018 (CA1 1969); *United States ex rel. Cooper* v. *Reincke*, 333 F. 2d 608 (CA2 1964); *United States ex rel. Budd* v. *Maroney*, 398 F. 2d 806 (CA3 1968); *DeToro* v. *Pepersack*, 332 F. 2d 341 (CA4 1964); *Walker* v. *Wainwright*, 409 F. 2d 1311 (CA5 1969); *Waddy* v. *Heer*, 383 F. 2d 789 (CA6 1967); *Butler* v. *Burke*, 360 F. 2d 118 (CA7 1966); *Pope* v. *Swenson*, 395 F. 2d 321 (CA8 1968); *Wilson* v. *Harris*, 351 F. 2d 840 (CA9 1965); *Latham* v. *Crouse*, 320 F. 2d 120 (CA10 1963); *Headen* v. *United States*, 115 U. S. App. D. C. 81, 317 F. 2d 145 (1963).

clusion in favor of prospective application." *Stovall* v. *Denno*, *supra*, at 299.

We do not regard petitioner's case as calling for a contrary conclusion merely because he made a pretrial motion to dismiss the indictment, or because his conviction is before us on direct review. "[T]he factors of reliance and burden on the administration of justice [are] entitled to such overriding significance as to make [those] distinction[s] unsupportable." *Stovall* v. *Denno*, *supra*, at 300–301. Petitioner makes no claim of actual prejudice constituting a denial of due process. Such a claim would entitle him to a hearing without regard to today's holding that *Coleman* is not to be retroactively applied. See *People* v. *Bernatowicz*, 35 Ill. 2d 192, 198, 220 N. E. 2d 745, 748 (1966); *People* v. *Bonner*, 37 Ill. 2d 553, 561, 229 N. E. 2d 527, 532 (1967).

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring in the result.

I concur in the result but maintain the view expressed in my dissent in *Coleman* v. *Alabama*, 399 U. S. 1, 21 (1970), that while counsel should be provided at preliminary hearings as a matter of sound policy and judicial administration, there is no *constitutional* requirement that it be done. As I noted in *Coleman*, the constitutional command applies to "criminal prosecutions," not to the shifting notion of "critical stages." Nor can I join in the view that it is a function of constitutional adjudication to assure that defense counsel can "fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial" or "discover the case the State has against his client."

399 U. S., at 9. Nothing could better illustrate the extra-constitutional scope of *Coleman* than the interpretation of it now to explain why we do not make it "retroactive."

MR. JUSTICE BLACKMUN, concurring in the result.

Inasmuch as I feel that *Coleman* v. *Alabama*, 399 U. S. 1 (1970), was wrongly decided, I concur in the result.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Until *Linkletter* v. *Walker*, 381 U. S. 618 (1965), the Court traditionally applied new constitutional criminal procedure standards to cases finalized and police practices operative before the promulgation of the new rules.[1] *Linkletter*, however, was the cradle of a new doctrine of nonretroactivity which exempts from relief the earlier victims of unconstitutional police practices. I have disagreed on numerous occasions with applications of various brands of this doctrine and I continue my dissent in this case.[2] My own view is that even-handed justice requires either prospectivity only[3] or complete retro-

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[1] *E. g.*, *Eskridge* v. *Washington Prison Board*, 357 U. S. 214 (1958); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Jackson* v. *Denno*, 378 U. S. 368 (1964), (see also *Daniel* v. *United States*, 394 U. S. 244, 250 n. 15 (1969)); *Roth* v. *Pate*, 367 U. S. 433 (1961).

[2] *Linkletter* v. *Walker*, 381 U. S. 618, 640 (1965); *Tehan* v. *Shott*, 382 U. S. 406, 419 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719, 736 (1966); *Stovall* v. *Denno*, 388 U. S. 293, 302 (1967); *DeStefano* v. *Woods*, 392 U. S. 631, 635 (1968); *Daniel* v. *United States*, 394 U. S. 244, 255 (1969); *Halliday* v. *United States*, 394 U. S. 831, 835 (1969); *Mackey* v. *United States*, 401 U. S. 667, 713 (1971).

[3] It was suggested in *Stovall* v. *Denno*, *supra*, at 301, that a prospective only holding would violate the Art. III requirement of case or controversy. But see *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 422 (1964), where the Court exempted the petitioner from its holding. See also *Johnson* v. *New Jersey*, *supra*, at 733.

activity. To me there is something inherently invidious as Justice Harlan phrased it, in "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule . . . ." *Mackey* v. *United States*, 401 U. S. 667, 679 (1971) (separate opinion). I agree with his critique, id., at 695, that the purported distinction between those rules that are designed to improve the factfinding process and those designed to further other values was "inherently intractable" and to illustrate his point he adverted to the Court's difficulty in reconciling with its rule such nonretroactivity cases as *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *Stovall* v. *Denno*, 388 U. S. 293 (1967), and *DeStefano* v. *Woods*, 392 U. S. 631 (1968), all of which held nonretroactive decisions designed, in part, to enhance the integrity of the factfinding process. He also questioned the workability of any rule which requires a guess as to "whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle." *Mackey* v. *United States*, *supra*, at 695; *Desist* v. *United States*, 394 U. S. 244, 263 (1969). For example, as I suggest *infra*, at 293–295, a serious question arises in this case whether *Coleman* v. *Alabama*, 399 U. S. 1 (1970), should have been fully anticipated by state judicial authorities.[4]

[4] While I subscribe to many of the reservations expressed by Mr. Justice Harlan, I nonetheless find his alternative rule of retrospectivity unsatisfactory. In *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (separate opinion), he suggested that constitutional decisions be retroactive as to all nonfinal convictions pending at the time of the particular holdings but that prisoners seeking habeas relief should generally be treated according to the law prevailing at the time of their convictions. It is on this latter score that I am troubled. Surely it would be no more facile a task to unearth the

Additionally, it is curious that the plurality rule is sensitive to "reasonable reliance" on prior standards by law enforcement agencies but is unconcerned about the state of law of years past than it is to assign, under the plurality's test, a degree of reasonableness to reliance on older standards by law enforcement agencies. Where the question has arisen in this Court, we have treated habeas petitioners by the modern law, not by older rules. See *Rock* v. *Pate*, 367 U. S. 433 (1961) (habeas permitted on basis of current law to release prisoner convicted in 1936). See also *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Jackson* v. *Denno*, 378 U. S. 368 (1964), announcing new rules in habeas cases. Moreover, as has been concluded by Professor Schwartz, the drawing of a bright line between federal review through habeas and certiorari would be unjustified:

"Where federal review of the constitutionality of state criminal proceedings is concerned, the making of so sharp a distinction between review on certiorari and habeas corpus is unwarranted. There is often no significant difference with respect to age and potential staleness between the two types of cases. Rather than coming years after the conviction is final, habeas corpus is often but a routine step in the criminal defense process—the normal step taken after certiorari has been denied. Sometimes, it actually replaces certiorari, for in *Fay* v. *Noia* [372 U. S. 391 (1963)] the Supreme Court advised criminal defendants to skip certiorari and to petition directly to the federal district court for habeas corpus. Even in situations in which a defendant goes through all the direct review steps, it is often nothing more than fortuitous circumstance which determines whether his case is still on direct review or is on collateral attack when the new decision comes down.

"The difference between review on certiorari and habeas corpus seems even less significant when we look to function and actual operation. Although it is sometimes considered the 'normal' method for obtaining federal review of state convictions, certiorari does not provide, as the Court remarked in *Fay* v. *Noia*, 'a normal appellate channel in any sense comparable to the writ of error,' for the Court must limit its jurisdiction to questions that have significance beyond the immediate case. Habeas corpus, on the other hand, facilitates the Court's task in those cases it does take by providing a record focused exclusively on the federal constitutional question. Habeas corpus has thus become the primary vehicle for immediate federal

unfairness of arbitrarily granting relief to Coleman but denying it to Adams.

Given my disagreement with the plurality's rule, I am reluctant even to attempt to apply it, but even by its own

review of state convictions. Further, this development has resulted in a gradual shrinking of what were once significant operational differences between review on certiorari and habeas corpus, such as the relationship to the state proceeding, the degree of independent fact-finding authority, and the significance of the defendant's violation of state procedural rules. From both the functional and the operational standpoints, then, it is justifiable to conclude that 'the distinctions between habeas corpus proceedings and direct review are largely illusory.'

"In addition, drawing a line between review [on] certiorari and habeas corpus undercuts the Supreme Court's bypass suggestion in *Fay v. Noia*. If a defendant has doubts about the retroactivity of any claim which might both affect him and be subject to Court review in the foreseeable future, he will be well advised always to ignore the Court's suggestion and to apply for certiorari. Many months may pass before his petition for certiorari is rejected, and so long as it is pending, he will be entitled to receive the benefits of any intervening decisions. As soon as he files his petition for habeas corpus, however, even if he does so only a day after the last state court order is entered, he will have forfeited his right to such benefits. He will thus be put to an election between delayed *relief* and no *relief* at all.

"The inequity of drawing a sharp distinction between direct review and habeas corpus is, however, only one aspect of a broader inequity: treating two prisoners deprived of the same fundamental constitutional right differently merely because the Supreme Court did not get around to enunciating a particular right until after the conviction of one of them had become final. Professor Mishkin argues that worry about this point ignores 'the reasons for barring current convictions and . . . the fact that the new rule in no way undermines the earlier determinations of factual guilt.' To him, it is as if a guilty person were to complain of his lot because others equally guilty were not prosecuted. And though he recognizes that such claims are sometimes sustained, he concludes that 'there are certainly rational bases for drawing a line between current convictions and

terms, the balancing approach would appear to require that we hold *Coleman* retroactive. This conclusion reinforces my fear that the process is too imprecise as a neutral guide for either this Court or the lower courts and will invariably permit retroactivity decisions to turn on predilections, not principles.

I

In applying the rule, I am first troubled by the plurality's adoption of the finding of the court below that: "On [the] scale of probabilities, we judge that the lack of counsel at a preliminary hearing involves less danger to 'the integrity of the truth-determining process at trial' than the omission of counsel at the trial itself or on appeal." *Ante*, at 262–263. The same might have been said of the right to counsel at sentencing, *Mempa*

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those previously final,' citing excerpts from Professors Bator and Amsterdam on finality. Professor Mishkin's sharp distinction between collateral attack and direct review thus rests ultimately on finality considerations.

"Finality' considerations seem especially weak where two cases differ only in the fact that one is still on 'direct' review whereas the other is not. Where the two cases are far apart in age, finality considerations are admittedly more persuasive. But even there, the mere timing of the Court's decision to grant federal protection to a fundamental right hardly seems to be a sufficient basis for unequal treatment; after all, in most instances it was not the older prisoner's fault that the Court did not render its decision earlier. To some extent, of course, the question comes down to a choice between the competing values of equality and repose, and choices of this sort are notoriously incapable of reasoned resolution. It will be suggested below, however, that the threat to finality considerations from complete retroactivity appears to have been greatly exaggerated, and if this suggestion is well taken, Professor Mishkin's rejection of equality is especially unfortunate." Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719, 721–724 (1966).

v. *Rhay*, 389 U. S. 128 (1967), at certain arraignments, *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), or at preliminary hearings where guilty pleas were taken, *White* v. *Maryland*, 373 U. S. 59 (1963), all of which have been held retroactive.[5]

Rather than reaching for these analogies, however, the plurality suggests that the danger to the integrity of the truth-determining process is no greater here than at a pretrial lineup or at an interrogation conducted without counsel. In relying on these analogies, the plurality gives short shrift to the argument that "in practice [the preliminary] hearing may provide the defense with the most valuable discovery technique available to him," *Wheeler* v. *Flood*, 269 F. Supp. 194, 198 (EDNY 1967), an objective which is not so readily achievable at lineups and interrogations at which counsel serves only a protective function. The State's access to superior investigative resources and its ability to keep its case secret until trial normally puts the defendant at a clear disadvantage.[6]

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[5] See *McConnell* v. *Rhay*, 393 U. S. 2 (1968) (*Mempa* retroactive); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968) (*White* and *Hamilton* retroactive).

[6] The investigative advantage enjoyed by the State extends beyond the prohibition of the common law against criminal discovery. It also results from the fact that the police are usually first at the scene of the crime, have access to witnesses with fresher recollections, are authorized to confiscate removable evidence, are positioned to conduct laboratory tests on physical evidence, enjoy a communication channel with a complete undercover world of secret informers, have an air of legitimacy which is conducive to cooperation by witnesses, and have numerous ways to compel testimony even before trial. See generally Norton, Discovery in the Criminal Process, 61 J. Crim. L., C. & P. S. 11, 13–14 (1970); Comment, Criminal Law: Pre-Trial Discovery—The Right of an Indigent's Counsel to Inspect Police Reports, 14 St. Louis U. L. J. 310 (1969); Moore, Criminal Discovery, 19 Hastings L. J. 865 (1968); A State Statute to Liberalize Criminal Discovery, 4 Harv. J. Legis. 105 (1967); Comment, Disclosure and Discovery in Criminal Cases: Where Are We

In light of this disparity, one important service the preliminary hearing performs is to permit counsel to penetrate the evidence offered by the prosecution at the hearing, to test its strengths and weaknesses (without the presence of a jury), to learn the names and addresses of witnesses, to focus upon the key factual issues in the upcoming trial, and to preserve testimony for impeachment purposes. The alternative discovery techniques suggested now by the plurality are puny in comparison. A bill of particulars can usually reach only prosecution witnesses' names, and it may be cold comfort to defense counsel to learn that he can obtain pretrial statements of prosecution witnesses inasmuch as such statements are often prepared from the State's viewpoint and have not been subjected to cross-examination. And in many States such statements are not discoverable.

Finally, when read in light of *Coleman*'s exaltation of the virtues of counseled preliminary hearings, the present language of the plurality may lend itself to a "credibility gap" between it and those involved in the administration of the criminal process. "Plainly," said the *Coleman* Court, "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution," *Coleman v. Alabama*, *supra*, at 9, and: "The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a 'critical stage' of the State's criminal process at which the accused is 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Id.*, at 9–10. It will

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Rudstein, 6 Duquesne U. L. Rev. 41 (1967); Bibliography: Criminal Discovery, 5 Tulsa L. J. 207 (1968); Symposium: Discovery in Federal Criminal Cases, 33 F. R. D. 53 (1963); Brennan, Criminal Prosecution: Sporting Event or Quest For Truth?, 1963 Wash. U. L. Q. 279.

now appear somewhat anomalous that the right to counsel at a preliminary hearing is fundamental enough to be incorporated into the Fourteenth Amendment but not fundamental enough to warrant application to the victims of previous unconstitutional conduct.[1]

II

I also believe that the plurality's case for establishing good-faith reliance on "the old standards" by state judicial systems ignores important developments in the right-to-counsel cases prior to *Coleman*. First of all, no decision of this Court had held that counsel need not be afforded at the preliminary hearing stage. Therefore, to build a case for good-faith reliance the State must wring from our decision the negative implication that unassisted probable-cause hearings were permissible. Such negative implications are found, says the plurality, in *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), and *White* v. *Maryland*, 373 U. S. 59 (1963), cases reversing convictions obtained through the use at trial of unassisted guilty pleas entered at preliminary hearings. Neither of those decisions, however, faced the question of whether reversal

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[1] I am aware that the retroactivity theory presently commanding a Court permits a distinction between rules designed to fortify the reliability of verdicts and rules designed to protect other values. But here, as the plurality suggests, three of the four functions counsel might serve at preliminary hearings would appear to enhance the factfinding process: discovery of the State's case, preserving of testimony of both hostile and favorable witnesses, and obtaining release on bail. Although the plurality appears to discount the investigative advantage of being free on bail, I believe that this "traditional right to freedom before conviction permits the unhampered preparation of a defense." Stack v. Boyle, 342 U. S. 1, 4 (1951). See also *Kinney* v. *Lewis*, 425 F. 2d 209, 210 (CA9 1970), where the Court of Appeals found that "the appellant is the only person who can effectively prepare his own defense," because the incarcerated accused was the only person who could recognize witnesses by sight who might have seen a scuffle.

was required on the facts of the instant case. And, though I have studied these two short opinions, I am unable, as is the plurality, to divine any hidden message to law enforcement agencies that we would permit the denial of counsel at preliminary hearings where guilty pleas were not taken. Rather, these cases reinforce, in my mind, the importance of counsel at every stage in the criminal process. In any event, by the time *Coleman* came down, it was clear, as Mr. Justice Harlan opined, albeit with some regret, that our holding was an inevitable consequence of prior case law:

> "If I felt free to consider this case upon a clean slate I would have voted to affirm these convictions. But—in light of the lengths to which the right to appointed counsel has been carried in recent decisions of this Court, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967); *Mathis* v. *United States*, 391 U. S. 1 (1968); and *Orozco* v. *Texas*, 394 U. S. 324 (1969)—I consider that course is not open to me with due regard for the way in which the adjudicatory process of this Court, as I conceive it, should work. . . .
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> "It would indeed be strange were this Court, having held a suspect or an accused entitled to counsel at such pretrial stages as 'in-custody' police investigation, whether at the station house (*Miranda*) or even in the home (*Orozco*), now to hold that he is left to fend for himself at the first formal confrontation in the courtroom." *Coleman* v. *Alabama*, *supra*, at 19–20 (separate opinion).[*]

[*] To this list might have been added *Roberts* v. *LaVallee*, 389 U. S. 40 (1967), holding that the State must provide an indigent with a preliminary hearing transcript in every circumstance in which the more affluent accused could obtain one.

Thus, in the instant case, at the times relevant, the State should have foreseen that the right to counsel attached to the probable-cause hearing.

III

I also disagree that "[t]he impact upon the administration of the criminal law of [*Coleman* retroactivity] needs no elaboration." *Ante*, at 284. In the 19 months since *Coleman* was decided all new prosecutions have presumably followed it and we therefore need only be concerned, for impact purposes, with those state proceedings in which a preliminary hearing was held prior to June 1970. Inasmuch as the median state sentence served by felons when they are first released is about 20.9 months,[*] most pre-*Coleman* sentences would now be served and as a practical matter these former prisoners would not seek judicial review. Moreover, we may exclude from our consideration those 16 or more States that prior to *Coleman* routinely appointed counsel at or prior to preliminary hearings. See American Bar Association, Project on Standards for Criminal Justice, Providing Defense Services § 5.1 (Approved Draft 1968). Additionally, we may exclude[**] from consideration the possibility of collateral challenges by federal prisoners inasmuch as counsel have routinely been present at preliminary hearings before federal commissioners. See Fed. Rule Crim. Proc. 5 (b).

While there are some current prisoners who might challenge their confinements if *Coleman* were held retro-

[*] Federal Bureau of Prisons, National Prisoner Statistics—Characteristics of State Prisoners, 1960, pp. 26–27 (1965).

[**] In this respect the instant case further differs from *Stovall v. Denno*, 388 U. S., at 299, where it was found that: "The law enforcement officials of the Federal Government and of all 50 States have heretofore proceeded on the premise that the Constitution did not require the presence of counsel at pretrial confrontations for identification."

spective, many of these attacks would probably fail under the harmless-error rule of *Chapman* v. *California*, 386 U. S. 18 (1967). The plurality opinion suggests that conducting such harmless-error proceedings would be onerous. One reason given is that in Illinois, for example, preliminary hearings were not recorded before *Coleman*. That assertion may not be entirely accurate in light of the fact that this very record contains a transcript of Adams' preliminary hearing. Perhaps, as the respondent seems to concede,[11] transcripts were made available in other Illinois cases. That is the more reasonable assumption in light of our holding in *Roberts* v. *LaVallee*, 389 U. S. 40 (1967), that the State must provide a preliminary hearing transcript to an indigent in every circumstance in which the more affluent accused could obtain one.

Even where a transcript was not available, however, a prisoner might be able to show at an evidentiary hearing that he was prejudiced by a particular need for discovery, by the inability to preserve the testimony of either an adverse or favorable witness, or by the inability to secure his release on bail in order to assist in the preparation of his defense.[12] Courts are accustomed, of course, to assessing claims of prejudice without the aid of transcripts of previous proceedings, such as is required by *Jackson* v. *Denno*, 378 U. S. 368 (1964), or *Townsend* v. *Sain*, 372 U. S. 293 (1963). Indeed, in *Coleman* we remanded for a determination of whether the failure to appoint counsel had been harmless error. 399 U. S., at 11. Not every *Coleman* claim would warrant an evidentiary hearing. Many attacks might be disposed of summarily, such as a challenge to a conviction resulting from a counseled guilty plea entered before any preju-

[11] Respondent's Brief 33.

[12] See n. 7, *supra*.

dice had materialized from an uncounseled preliminary hearing. See *Procunier* v. *Atchley*, 400 U. S. 446 (1971).

Even *Stovall* v. *Denno*, 388 U. S., at 299, the analogy frequently invoked by the plurality, held out the possibility of collateral relief in cases where prisoners could show that their lineups had imposed "such unfairness that [they] infringed [their] right to due process of law." Conducting *Coleman* harmless-error hearings would not appear to be any more burdensome on the administration of criminal justice than have *Stovall* "fundamental fairness" post-conviction proceedings.

In any event, whatever litigation might follow a holding of *Coleman* retrospectivity must be considered part of the price we pay for former failures to provide fair procedures.